NOTES

INJUNCTION BY FEDERAL COURT AGAINST STATE COURT INTERFERENCE WITH NLRB BACK PAY ORDER*

SECTION 265 of the Judicial Code, originally enacted in 1793,[1] expressly denies to the federal courts the power to enjoin proceedings in state courts. Since the evidence on the original Congressional intent is inconclusive,[2] the courts have been uncertain as to the meaning of this statute. In the early nineteenth century, when the chief danger was thought to be federal encroachment on the proper domain of state courts and state officials, the federal courts were satisfied with a literal reading of the ostensibly absolute prohibition.[3] Later, however, interference by state courts began to hamper the expanding functions of federal officials and federal judicial proceedings,[4] and exceptions to Section 265 began to appear. By an express amendment in 1867, injunctions of state proceedings were allowed where "authorized by any law relating to proceedings in bankruptcy."[5] Starting with *French v. Hay*[6] in 1874, the Supreme Court began to find reasons why the terms of the statute should not be applied. Since that time, later statutes have been construed as amendments to Section 265;[7] the provision has been held to restrict

* NLRB v. Sunshine Mining Co., 125 F. (2d) 757 (C. C. A. 9th, 1942).

1. 1 STAT. 335 (1793). The terms of the original statute were unqualified: ". . . nor shall a writ of injunction be granted to stay proceedings in any court of a state."

2. See 1791–1793: 3 ANNALS OF CONGRESS (1849). It has been suggested that the anti-injunction provision was a direct consequence of a proposal by Attorney General Edmund Randolph to amend the Judiciary Act of 1789, for the purpose of preventing the federal courts of equity from interfering with the enforcement of judgments at law rendered in the state courts. Warren, *Federal and State Court Interference* (1930) 43 HARV. L. REV. 345. There are indications that the statute is the direct result of the then strong feeling against the unwarranted intrusion of federal courts upon state sovereignty or the prevailing prejudices against equity jurisdiction. See Toucey v. N. Y. Life Ins. Co., 314 U. S. 118, 131 (1941); THE JOURNAL OF WILLIAM MACLAY (1927) 92-94, 101-106. Others believe that ". . . Congress, without thinking the matter through to the end, meant precisely that no injunctions should be granted to stay any proceedings in state courts." Durfee and Sloss, *Federal Injunction against State Proceedings in State Courts* (1932) 30 MICH. L. REV. 1145, 1146.

3. Orton v. Smith, 18 How. 263 (U. S. 1855); Peck v. Jenness, 7 How. 612 (U. S. 1849); Diggs & Keith v. Woolcott, 4 Cranch 179 (U. S. 1807). See Durfee and Sloss, *supra* note 2, at 1148.

4. See Warren, *supra* note 2, at 348.

5. 36 STAT. 1162 (1911), 28 U. S. C. § 379 (1940). The Revised Statutes of 1875 reenacted the provision of 1793 but introduced the bankruptcy exception. REV. STAT. § 720 (1875). The provision is based upon § 21 of the Bankruptcy Act of 1867, 14 STAT. 526 (1867). The only authorization for injunctions in the Bankruptcy Act is 30 STAT. 545 (1900), 11 U. S. C. § 11 (1940), which provides for a stay of pending suits in bankruptcy.

6. 22 Wall. 250 (U. S. 1874) (upholding an injunction against enforcement of a state court judgment secured in a suit which had been previously removed to a federal court).

7. Bondurant v. Watson, 103 U. S. 281 (1880).

the power to restrain state tribunals, but not the power to enjoin the litigating parties;[8] the term "proceedings" has been interpreted to refer only to proceedings prior to judgment and therefore not to prohibit injunctions against subsequent actions;[9] and the execution of void and inequitable judgments has been freely enjoined.[10] The trend has thus been to recognize that the laying down of a rigid formula is both impracticable and undesirable.[11]

In *Toucey v. New York Life Insurance Company*,[12] however, Mr. Justice Frankfurter attempted a strict construction of Section 265 by listing and approving all the accepted departures from the letter of the statute. By the only express legislative amendment, an injunction may be granted when authorized by any law relating to proceedings in bankruptcy. In several other instances subsequent statutes have been held to operate as implied amendments to the Act of 1793. Thus, Section 265 has been held inapplicable[13] in connection with the Interpleader Act of 1926, which definitely allows the injunctive remedy "notwithstanding any provision of the Judicial Code to the contrary,"[14] and with the Removal Acts.[15] The Act of 1851,

8. See Marshall v. Holmes, 141 U. S. 589, 599 (1891). But see Hill v. Martin, 296 U. S. 393 (1935).

9. See Simon v. Southern Ry., 236 U. S. 115, 124 (1914). In Essanay Film Mfg. Co. v. Kane, 258 U. S. 358, 360 (1922), Justice Pitney distinguished the *Simon* case on the ground that the injunction issued against execution after judgment. But see Central Vermont Ry. v. Redmond, 189 Fed. 683, 688 (C. C. D. Vt. 1919). But that the *French* case did not rest on such a narrow basis was made clear by the Supreme Court in Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239 (1905), where the issuance of an injunction against proceedings prior to judgment was also held proper. *Accord:* Dillinger v. Chicago, B. & Q. Ry., 19 F. (2d) 196 (C. C. A. 8th, 1927); Hunt v. Pierce, 284 Fed. 321 (C. C. A. 8th, 1922); Baltimore & Ohio R. R. v. Ford, 35 Fed. 170 (C. C. D. W. Va. 1888). But *cf.* Missouri, K. & T. R. R. v. Scott, 13 Fed. 793 (C. C. N. D. Tex. 1882).

10. Essanay Film Co. v. Kane, 258 U. S. 358 (1922); Wells Fargo & Co. v. Taylor, 254 U. S. 175 (1920); Simon v. Southern Ry., 236 U. S. 115 (1914); Marshall v. Holmes, 141 U. S. 589 (1891).

11. Compare Gordon v. Gilfoil, 99 U. S. 168 (1878); Stanton v. Embrey, 93 U. S. 548 (1876); City of Ironton v. Harrison Construction Co., 212 Fed. 353 (C. C. A. 6th, 1914); Slaughter v. Mallet Land & Cattle Co., 141 Fed. 282 (C. C. A. 5th, 1905); Barber Asphalt Paving Co. v. Morris, 132 Fed. 945 (C. C. A. 8th, 1904); Fradello v. United States Marine Contracting Corp., 36 F. (2d) 510 (E. D. N. Y. 1928).

12. 314 U. S. 118 (1941). The federal district court, having acquired jurisdiction over an action concerning an insurance policy and having decided the issues, was held not to have the power to enjoin an attempted relitigation in a state court.

13. On interpleader, see Treinies v. Sunshine Mining Co., 308 U. S. 66, 74 (1939); Dugas v. American Surety Co., 300 U. S. 414, 428 (1937). On removal, see 2 HUGHES, FEDERAL PRACTICE (1931) § 1099; 2 FOSTER, FEDERAL PRACTICE (6th ed. 1920) §§ 270, 270a; Comment (1922) 36 HARV. L. REV. 461.

14. 44 STAT. 416 (1926), 28 U. S. C. § 41(26) (1940), amending 39 STAT. 929 (1917).

15. The first removal act of 1789 [1 STAT. 73, 79 (1789)] was frequently amended. For the present form of the provision, see 28 U. S. C. § 71 (1940).

limiting liability of shipowners,[16] and the Frazier-Lemke Act[17] have been similarly construed.[18] The only judicially developed exception approved by the majority in the *Toucey* case[19] arose in situations where the federal courts have taken custody of a *res*,[20] and is justified as seeking to avoid physical friction between state and federal officials over the property.[21] Yet under a long line of cases a federal court's own prior jurisdiction may be protected by an injunction against interference by state court proceedings.[22] The direct holding in the *Toucey* case was that an injunction may not be issued to restrain mere relitigation in the state courts;[23] but it is not clear whether the theory of these "prior jurisdiction" cases was completely repudiated.[24]

The difficulties of applying the strict construction of Section 265 advocated by Mr. Justice Frankfurter are apparent from the confused opinion in *NLRB v. Sunshine Mining Company*.[25] In that case the Ninth Circuit Court of Appeals had entered a decree enforcing an NLRB order, which provided for payment of an undetermined amount of back pay. Subsequently, creditors of the employees brought twenty-seven separate actions against the employer in Idaho state courts to garnish whatever sums might become due to these employees. In several cases the state courts went so far as to enjoin the employer from paying the back pay. The Board petitioned the Circuit Court to enjoin the garnishers, and the court held that Section 265 did not prevent the injunction.

16. 9 STAT. 635, 636 (1851). See Providence & N. Y. Steamship Co. v. Hill Mfg. Co., 109 U. S. 578, 600 (1883); Admiralty Rule 51 [28 U. S. C. following § 723 (1940)].

17. 47 STAT. 1473 (1933), 11 U. S. C. § 203 (1940). See Kalb v. Feuerstein, 308 U. S. 433 (1939).

18. See Toucey v. New York Life Ins. Co., 314 U. S. 118, 134 (1941).

19. *Id.* at 139: "We find, therefore, that apart from Congressional authorization, only one exception has been imbedded in § 265 by judicial construction, to wit the *res* cases." This conclusion, however, is somewhat weakened by Mr. Justice Frankfurter's approval of Looney v. Eastern Texas R. R., 247 U. S. 214 (1918). Although he did not consider it a relitigation case, he found no fault with the fact that "the court issued the injunction . . . merely to protect its jurisdiction until the suit brought by the carriers was finally settled." 314 U. S. at 138.

20. 314 U. S. at 135. Typical cases are Freeman v. Howe, 24 How. 450 (U. S. 1861); Taylor v. Carrly, 20 How. 583, 597 (U. S. 1858); Hagan v. Lucas, 10 Pet. 400 (U. S. 1836); see also Kline v. Burke Construction Co., 260 U. S. 226, 235 (1922); Lion Bonding Co. v. Katz, 262 U. S. 77, 88-89 (1923). Where the state court first takes custody, the federal court cannot interfere. Palmer v. Texas, 212 U. S. 118 (1909).

21. See Toucey v. New York Life Ins. Co., 314 U. S. 118, 135 (1941).

22. See cases collected in 1 MOORE, FEDERAL PRACTICE (1938) 235, n. 29; 2 FOSTER, FEDERAL PRACTICE (6th ed. 1920) §§ 270, 270a; JOYCE, INJUNCTIONS (1909) § 88; 1 BATES, FEDERAL EQUITY PROCEDURE (1901) § 541.

23. See Toucey v. New York Life Ins. Co., 314 U. S. 118, 141 (1941).

24. *Id.* at 140. The court distinguished the cases of Supreme Tribe of Ben Hur v. Cauble, 255 U. S. 356 (1921), Looney v. Eastern Texas R. R., 247 U. S. 214 (1918), and Dial v. Reynolds, 96 U. S. 340 (1877), as not based on the ground of "relitigation," but gave no adequate reason why they should be upheld.

25. 125 F. (2d) 757 (C. C. A. 9th, 1942).

Since questions concerning the nature of back-pay awards were held to be federal questions, particularly as to whether unexecuted awards are "subject" to state process, the court assumed jurisdiction. Because there was some doubt as to whether the NLRB could intervene in the state proceedings,[26] and there was no legal remedy available in the federal courts, the court was ready to exercise its equity powers. In overcoming the hurdle of Section 265, the court first narrowed the force of the *Toucey* case to its direct holding, that relitigation in the state courts does not justify an injunction, and pointed out that this did not apply to the *Sunshine* case.[27] Since the policy and express terms of the National Labor Relations Act[28] sought expeditious performance of the decree, the court refused to apply Section 265. Furthermore, the award of back pay was held not to be a private right, and the subject matter was said to remain "exclusively under the administrative authority of the Board in control of the court" till the employee actually received his award.[29] Hence any attempt by the state courts "to shackle or impede" the court's power to effectuate its decree was considered to be an enjoinable interference.[30] Then the court proceeded to liken the present case to the *res* cases, in an attempt to bring the case within one of the *Toucey* exceptions, and finally returned to the National Labor Relations Act, which gives the district court "exclusive jurisdiction."

As in the *Sunshine* case, the execution of orders of federal administrative bodies or courts may be hampered by actions in the state courts. For example, under the National Labor Relations Act the federal courts supervise and enforce various orders of the Labor Board, including preliminary orders made before the administrative process has completed disposition of the case.[31] In the adjustment of industrial conflicts, such orders are necessarily subject to constant modification. Orders by other federal administrative agencies require enforcement in the federal courts,[32] and similar problems can arise. Moreover, the specific exception in Section 265 does not apply to all proceedings in bankruptcy. In all of these situations the federal courts need the power to enjoin interference by state courts. But, in view of the *Toucey* case, federal courts will find it difficult to issue such injunctions. However, such action may be justified under one of the Frankfurter exceptions, as one of the legislative amendments or as involving the disposition of a *res*. Or

26. The IDAHO CODE ANN. (1932) § 5-322 contains no express provision for the intervention of administrative boards.

27. 125 F. (2d) 757, 760 (C. C. A. 9th, 1942).

28. 49 STAT. 449 (1935), 29 U. S. C. §§ 151-219 (1940).

29. 125 F. (2d) 757, 761 (C. C. A. 9th, 1942).

30. The court further pointed to NLRB v. Carlisle Lumber Co., 103 F. (2d) 183 (C. C. A. 9th, 1939), where the decree was subsequently modified, because of the employer's inability to pay the award, to allow him to pay in installments. The possibility of such modification is another argument against third parties' acquiring rights by the mere issuance of the award.

31. 49 STAT. 453 (1935), 29 U. S. C. § 160(e) (1940).

32. See Fair Labor Standards Act, 52 STAT. 1065-1066 (1938), 29 U. S. C. §§ 210, 211 (1940); Federal Trade Commission Act, 38 STAT. 717 (1914), 15 U. S. C. § 45 (1940). On the Federal Communications Commission, see 48 STAT. 1092 (1934), 47 U. S. C. § 401 (1940). See Note (1942) 52 YALE L. J. 175, *infra*.

there might be induced from the Frankfurter exceptions a broader, more generic principle which would be applicable.[33]

If the National Labor Relations Act is to be considered as an implied amendment to Section 265, the wording of that act must be compared to that of the other acts which have been so construed. The Act of 1851 provides that, after a shipowner transfers his interest in the vessel to a trustee for the benefit of claimants, "all claims and proceedings against the owner or owners shall cease."[34] From this simple phrase the courts have been willing to imply that the act constitutes an amendment to Section 265.[35] Similarly, in the Frazier-Lemke Act[36] the words "exclusive jurisdiction" and the provision that proceedings "shall not be instituted or if instituted at any time prior to the filing of a petition under this section shall not be maintained in this court" have been construed as authorizing an injunction of state proceedings.[37] The relevant section of the National Labor Relations Act reads as follows: "The jurisdiction of the court shall be exclusive and its judgment shall be final except that the same shall be subject to review by the appropriate court of appeals . . . and by the Supreme Court of the United States."[38] The words "exclusive" and "final," and the special naming of only two other courts that may touch the matter, certainly might be deemed to mean that no other courts could adjudicate any claim directly involving the subject matter of the federal decree.

The judicially developed exception to Section 265, when federal courts have assumed custody of a *res*,[39] could also be extended to justify federal injunctions protecting federal administrative orders. Under a strict interpretation of Mr. Justice Sutherland's enunciation of this doctrine in *Kline v. Burke Construction Company*,[40] if a federal court wants to enjoin subse-

33. Another possibility is to consider the Board as the United States and to follow the line of cases which hold that § 265 does not apply where the United States is an interested party. United States v. Bank of N. Y. Trust Co., 296 U. S. 464 (1936); United States v. Babcock, 6 F. (2d) 160 (D. Ind. 1925), *rev'd for modification of injunction*, 9 F. (2d) 905 (C. C. A. 7th, 1925); United States v. Phillips, 33 F. Supp. 261 (N. D. Okla. 1940), *vacated on other grounds*, 312 U. S. 246 (1941); United States v. Dewar, 18 F. Supp. 981 (D. Nev. 1937); United States v. Inaba, 291 Fed. 416 (D. C. 1923), 72 U. OF PA. L. REV. 192.

34. 9 STAT. 635, 636 (1850).

35. Providence & N. Y. Steamship Co. v. Hill Mfg. Co., 109 U. S. 578, 600 (1883); see Admiralty Rule 51 [28 U. S. C. following § 723 (1940)].

36. 47 STAT. 1473 (1933), 11 U. S. C. § 203 (1940).

37. See Kalb v. Feuerstein, 308 U. S. 433 (1939).

38. 49 STAT. 454 (1935), 29 U. S. C. § 160 (1940).

39. See 1 MOORE, FEDERAL PRACTICE (1938) 231.

40. 260 U. S. 226 (1922). An injunction against the prosecution of an action in a state court was refused because the action in the federal court was merely *in personam*. The Court said (at 235): "The rank and authority of the courts are equal but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since the necessity does exist in actions *in rem* and does not exist in actions *in personam*, involving a question of personal liability only, the rule applies to the former but does not apply to the latter."

quent state actions, the federal court must have taken actual possession of the *res*, and the actions involved must be actions *in rem*. But the trend has been toward a more liberal construction. For example, in *Julian v. Central Trust Company*,[41] although the property which was the subject of the federal suit had passed out of the possession of the federal court long before, an injunction was upheld under the *res* exception.[42] Moreover, in *Baltimore & Ohio Railroad v. Wabash Railroad*[43] the court said:

> "The rule is not limited to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all suits of a like nature."

In a later consideration by Mr. Justice Sutherland of proceedings *in rem*, the broad scope of the *res* exception was similarly emphasized.[44] Finally, the *res* exception actually extends to actions *in personam*; for example, in cases of federal court receivership,[45] no suit can be brought against the receiver without permission of the court which appointed him, and creditors suing in state courts have been enjoined.[46] Situations like the *Sunshine* case might be considered comparable to receivership proceedings. The Board might be said to assume the position of the receiver, acting practically as an officer of the court in enforcing the policies of the Act as expressed by the decree.[47] As with assets in the hands of a receiver, the back pay award has been interpreted as not conferring a private right, and not giving the employee a chose in action.[48] By this analogy, interference by creditors in the state courts could be considered enjoinable under the *res* exception.[49]

41. 193 U. S. 93 (1904).

42. *Accord:* Stewart v. Wisconsin Cent. Ry., 117 Fed. 782 (C. C. N. D. Ill. 1902); Fidelity Ins. Trust & Safe Deposit Co. v. Norfolk & Western R. R., 88 Fed. 815 (C. C. W. D. Va. 1898); see Taylor and Willis, *The Power of Federal Courts to Enjoin State Proceedings* (1933) 42 YALE L. J. 1169, 1178.

43. 119 Fed. 678, 680 (C. C. A. 7th, 1902).

44. Local Loan Co. v. Hunt, 292 U. S. 234, 241 (1934). The Court, citing Hanover Nat. Bank v. Moyses, 186 U. S. 181, 192 (1901), and Commercial Bank of Manchester v. Buckner, 20 How. 108, 118, 119 (U. S. 1858), said: "And, generally, proceedings in bankruptcy are in the nature of proceedings *in rem*, adjudications of bankruptcy and orders of discharge being, as this court clearly has treated them, in every essential particular decrees in equity determining a status."

45. See Beach, *Judgment Claims in Receivership Proceedings* (1920) 30 YALE L. J. 674.

46. *Re* Metropolitan Ry. Receivership, 208 U. S. 90 (1908); United States v. Brown, 281 Fed. 657 (C. C. A. 8th, 1922); Smith v. Missouri Pac. R. R., 266 Fed. 653 (C. C. A. 8th, 1920).

47. NLRB v. Link-Belt Co., 311 U. S. 584, 600 (1941); Amalgamated Utility Workers v. Consolidated Edison Co., 309 U. S. 261 (1940); NLRB v. Pennsylvania Greyhound Line, 303 U. S. 261 (1938).

48. National Licorice Co. v. NLRB, 309 U. S. 350 (1940); NLRB v. American Potash & Chemical Corp., 113 F. (2d) 232 (C. C. A. 9th, 1940); NLRB v. Colten, 105 F. (2d) 179, 182 (C. C. A. 6th, 1939); Agwilines v. NLRB, 87 F. (2d) 146 (C. C. A. 5th, 1936).

49. In allowing an injunction even though the *res* had passed out of possession of the court, the above cases make irrelevant the question of the dissenting justice

However, it would be stretching the meaning of the *res* exception rather far to include the instant case; and the terms *in rem* and *in personam* are in themselves somewhat too slippery to serve as the basis of a workable, unambiguous distinction.

A more generic principle to uphold injunctions in these situations could be found in a doctrine of enforced comity. Under the general rule of comity, the state and federal courts are required to respect each other's jurisdiction. The reluctance of the federal courts to interfere with state determinations is manifested, among other places, in Section 265.[50] Similarly, state courts are usually reluctant to interfere with federal judgments.[51] And if the state courts refuse to follow this rule of comity, the federal courts enforce it by injunctions. An established example of this enforced comity is the *res* exception.[52] Similarly, the reluctance of the federal courts to interfere with state administrative commissions has been indicated by the *Interborough* case[53] and *Hawks v. Hamill*,[54] and by the Johnson Acts of 1934.[55] By the comity principle, the state courts should refrain from hampering federal administrative proceedings and proceedings in the federal courts to enforce federal administrative orders. If the state courts do interfere, the federal courts could enforce the principle of comity by injunctions against the state proceedings. While the basis of this principle is rather flimsy and its scope is probably too broad, its adoption would permit an escape from

in the instant case: "Did this court by enforcing the Board's order awarding back pay take into possession a *res*?" NLRB v. Sunshine Mining Co., 125 F. (2d) 757, 763 (C. C. A. 9th, 1942).

50. Amusement Syndicate Co. v. El Paso Land Improvement Co., 251 Fed. 345 (D. Tex. 1918); People's Gaslight & Coke Co. v. Chicago, 192 Fed. 398 (C. C. D. Ill. 1911); Dillon v. Kansas City S. B. Ry., 43 Fed. 109 (C. C. D. Mo. 1890). The question has also been raised whether the statute has any use at all. See Durfee & Sloss, *Federal Injunction against State Proceedings in State Courts* (1932) 30 MICH. L. REV. 1145, 1169.

51. The rule of equal freedom for the state courts was established under the doctrine of comity at the time when the Supreme Court was laying down the rule of freedom of the federal courts from interference by state courts. See Warren, *Federal and State Court Interference* (1930) 43 HARV. L. REV. 345, 348-349.

52. See Toucey v. New York Life Ins. Co., 314 U. S. 118, 135 (1941). Mr. Justice Frankfurter stated: "The reciprocal of the *res* cases is but an application of the reason underlying the act."

53. Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159 (1929), in which the Supreme Court held that, where jurisdiction is predicated solely on diversity of citizenship and the questions involved are purely local, the federal court will not grant an injunction against actions on the part of state officers unless the case is absolutely clear. See Frankfurter and Landis, *The Business of the Supreme Court at October Term, 1928* (1929) 43 HARV. L. REV. 33, 61–62.

54. 288 U. S. 52 (1932) (state officers' belief that an indeterminate toll-bridge franchise was a perpetuity was held sufficient ground to protect them from interference by federal court injunctions).

55. 36 STAT. 1091 (1911), 28 U. S. C. § 41 (1940). The statutes withdraw jurisdiction from the federal courts to enjoin the enforcement, operation, or execution of an administrative board or commission of a state, or any rate making body, or any political subdivision where a plain, speedy remedy may be had in state courts. See Lockwood, Maw and Rosenberry, *The Use of the Federal Injunction in Constitutional Litigation* (1930) 43 HARV. L. REV. 426, 456.

the strictness of the Frankfurter interpretation without doing direct violence to his decision.

But in order to give meaning to the many exceptions read into Section 265, a still more comprehensive formula may be stated. By a long line of authority beginning with *French v. Hay,* injunctions issued by federal courts against proceedings in state courts were justified on the ground of protecting the federal court's prior jurisdiction.[56] A gradual trend limited federal injunctions to cases where such action was absolutely necessary to preserve federal court control over the subject matter. This principle of "necessity" was developed at length by Mr. Justice Sutherland in the *Kline* case in 1926.[57] But in the final passage of the *Kline* case a further limitation to actions *in rem* was suggested, perhaps as an example of the principle of necessity;[58] and this has been interpreted as restricting federal injunctions to the *res* exception.[59] However, in a later decision by Mr. Justice Sutherland an injunction was upheld under the principle of necessity, even though the actions were *in personam.*[60] If federal courts have power to issue injunctions against state proceedings wherever necessary to preserve federal control over the subject matter involved, such power should certainly be available in all situations where the federal courts have been given exclusive jurisdiction of the subject matter. A federal court should be able to issue ancillary injunctions against state proceedings whenever the latter interfere with a matter within the exclusive jurisdiction of the federal court.[61] If this principle

56. See cases cited in 2 FOSTER, FEDERAL PRACTICE (6th ed. 1922) §§ 270, 270a; JOYCE, INJUNCTIONS (1909) § 88; 1 BATES, FEDERAL EQUITY PROCEDURE (1901) § 541.

57. See Durfee and Sloss, *Federal Injunction against State Proceedings in State Courts* (1932) 30 MICH. L. REV. 1145, 1164.

58. *Ibid.*

59. See Toucey v. New York Life Ins. Co., 314 U. S. 118, 135 (1941); and Taylor and Willis, *supra* note 42, an article written by two of Mr. Justice Frankfurter's disciples, developing the same interpretation of the *Kline* case.

60. Local Loan Co. v. Hunt, 292 U. S. 234 (1934). An injunction upon an ancillary bill in a bankruptcy proceeding forbade the prosecution in a state court of a claim discharged in bankruptcy, and was upheld. The Court placed its decision on the jurisdiction of the bankruptcy court to execute its decrees "notwithstanding the provision of § 265" of the Judicial Code. No mention is made of the exception in § 265 "except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." The only authorization for injunctions in the Bankruptcy Act is 30 STAT. 545 (1898), 11 U. S. C. § 11 (1940), which provides for a stay of pending suits in bankruptcy. The specific exception of § 265 was therefore inapplicable to the *Local Loan Co.* situation.

It might be contended that the *res* exception does not merely involve *actions in rem* and could therefore still be upheld even though *actions in personam* are permitted. But Mr. Justice Frankfurter based the *res* exception on the final passage of the *Kline* case, which speaks of *actions in rem* and was subsequently disavowed by Mr. Justice Sutherland. Therefore, if Mr. Justice Frankfurter upholds the *res* exception as meaning *actions in rem,* his authority seems to disappear by Sutherland's subsequent decision. On the other hand, if the *res* exception means something else, it is not very clear just what else it does mean and where any authority for that type of *res* exception can be derived from the *Kline* case.

61. A recent case upheld an injunction of state proceedings on similar grounds, but relied greatly on Section 262 of the Judicial Code, 36 STAT. 1162 (1911), 28 U. S. C.

were recognized, it would serve to reconcile the different exceptions which have been read into Section 265. In enforcing several federal statutes, injunctions have been upheld on the ground that these acts operated as implied amendments of the original prohibition; actually all these statutes gave the federal courts exclusive jurisdiction. Similarly, the *res* exception is based upon the federal court's exclusive jurisdiction over the *res*. Finally, this doctrine excludes the pure relitigation cases and is thus consistent with the narrow holding of the *Toucey* case.[62] In the *Sunshine* case, the federal court was given exclusive jurisdiction by the express terms of the National Labor Relations Act,[63] and in issuing the decree the court had assumed custody over the administrative proceeding.[64] The exclusive jurisdiction principle could thus justify granting the Board an injunction, as the only adequate remedy.[65] This theory of exclusive jurisdiction should provide a workable method of protecting exclusive federal control over similar administrative and judicial orders.[66]

§ 377 (1940), for additional statutory authorization. Canterbury v. Mandeville, 130 F. (2d) 208, 211 (C. C. A. 7th, 1942).

62. A distinction in the effect of the principle might be noted. Ordinarily the exclusive jurisdiction of the court attaches only to the proceeding and its immediate execution of judgment and therefore does not apply to relitigation in, for instance, removal cases where the court acquires exclusive jurisdiction after removal but only for the period of litigation and execution. The more permanent the nature of the adjudication, *i.e.*, if it involves the administration of an estate or bankrupt corporation or the disposal of realty, the more permanent is the exclusive jurisdiction of the court over the matter.

63. 49 STAT. 454 (1935), 29 U. S. C. § 160 (1940).

64. See pp. 153, 155. It might be argued that the court's exclusive jurisdiction does not extend as far as the relation between creditors and employees receiving back pay. Against this contention the court argued that if "third persons were permitted to obtain fixed rights growing out of the back pay awards, the court's power to effectively enforce its decree . . . would be subject to partial or complete frustration." See also note 30 *supra*. However adequate or inadequate the extension of exclusive jurisdiction to the creditor and debtor relation may be, the text merely contends that in a case where the assumption of exclusive jurisdiction is correct, the court should not hesitate to grant an injunction because of § 265.

65. By § 267 of the Judicial Code, 36 STAT. 1163 (1911), 28 U. S. C. § 348 (1940), if there is a "plain adequate remedy at law," there will be no equitable relief. In interpreting this section it has been held by the federal courts that "adequacy of remedy" refers to adequacy of remedy in the federal courts without regard to what remedies may exist in the state courts. National Surety Co. v. State Bank of Humboldt, Neb., 120 Fed. 593 (C. C. A. 8th, 1903); Chicago & N. W. Ry. v. Railroad Comm., 280 Fed. 387 (D. Minn. 1922); Jones v. Mutual Fidelity Co., 122 Fed. 560 (C. C. D. Del. 1903). It is therefore no argument to say that the Board might have intervened in the state court. See Local Loan Co. v. Hunt, 292 U. S. 241 (1933); Baltimore & Ohio R. R. v. Wabash R. R., 193 U. S. 93, 114 (1903). Besides, it is doubtful that the Board could have intervened in the Idaho court. *Cf.* IDAHO CODE ANN. (1932) §§ 5-322.

66. The above text is not concerned with the merits of the particular case. The suggestion is simply that the jurisdictional prerequisites to the court's exercise of its equity powers have been met.

OVERTIME COMPENSATION UNDER THE FAIR LABOR STANDARDS ACT FOR WORKERS WITH A FLUCTUATING NUMBER OF HOURS PER WEEK*

FEDERAL regulation of hours of labor is provided for in the same statute that governs minimum wages.[1] The requirement of extra pay for overtime can be broadly construed as applicable to all wage contracts subject to the Fair Labor Standards Act; or its coverage can be narrowed to include only those contracts where wages are at the statutory minimum. Section 7(a) of the Act provides that an employee must be compensated for each hour over 40 in any workweek "at a rate not less than one and one-half times the regular rate at which he is employed."[2] Where an employee is paid by the week,[3] there are five possible interpretations of the phrase "regular rate." First, it might be determined by dividing his total compensation for the week by the number of hours he worked during that period — an "actual wage" theory of Section 7(a). Second, it might be taken to refer only to the minimum rates specified in Section 6(a) of the Act[4] — a "minimum wage" theory. Third, it might mean the per hour rate specified in the employment contract — an "agreed-upon" theory. Two other possible interpretations are less important. The total compensation the employee receives might be divided by the statutory maximum number of hours at straight time. Finally, a fixed salary could be divided by the average number of hours worked per week during a base period of six months or a year.

The chances of settling upon one interpretation can be somewhat increased by eliminating from consideration the last two suggestions. The fourth possibility has found little favor in the courts,[5] and the fifth may be dismissed because the Act does not set out any period which might be used as a base to ascertain the average number of hours worked.[6] Three possibilities,

* Overnight Motor Transp. Co. v. Missel, 316 U. S. 572 (1942), *rehearing denied*, 63 Sup. Ct. 76 (U. S. 1942); Walling v. A. H. Belo Corp., 316 U. S. 624 (1942), *rehearing denied*, 63 Sup. Ct. 76 (U. S. 1942).

1. The Fair Labor Standards Act, 52 STAT. 1060 (1938), 29 U. S. C. §§ 201-219 (1940).

2. 52 STAT. 1063 (1938), 29 U. S. C. § 207 (1940).

3. The Act covers not only those workers paid on a per hour basis but also those receiving a salary [Overnight Motor Transp. Co. v. Missel, 316 U. S. 572 (1942); Boylan v. Liden Mfg. Co., 4 WAGE & HOUR REP. 158 (Mich. C. C. 1941); Hargrave v. Mid-Continent Petroleum Corp., 42 F. Supp. 908 (E. D. Okla. 1941); Fleming v. Pearson Hardwood Flooring Co., 39 F. Supp. 300 (E. D. Tenn. 1941)] or other method of compensation [Wagner v. Estate of Abe Field, 4 WAGE & HOUR REP. 329 (Ind. Super. Ct. 1941)].

4. 52 STAT. 1062 (1938), 29 U. S. C. § 206 (1940).

5. See Allen v. Moe, 4 WAGE & HOUR REP. 423 (D. Idaho 1941), *rev'd*, 5 WAGE & HOUR REP. 106 (D. Idaho 1942). The plaintiff-employee in the *Missel* case argued in the alternative that this was the correct method, but his contention was summarily dismissed. Missel v. Overnight Transp. Co., 40 F. Supp. 174 (D. Md. 1941).

6. The unit prescribed by § 7(a) for determining overtime is the workweek, and the Wage-Hour Division has stated that no averaging is permitted. Interpretative Bulletin No. 4, 1941 WAGE & HOUR MANUAL 127, 128-129. But an amendment to the

however, remain; and the Supreme Court of the United States has recently added to the confusion by using a different theory in each of two cases.

In *Overnight Motor Transportation Company v. Missel*[7] the Court adopted the "actual wage" theory. In instances where an employee received a fixed salary each week for a number of hours that fluctuated widely from week to week, the Court held that the regular rate should be found by dividing his salary by the number of hours worked during each week.[8] The fundamental policy of the Act was unequivocally stated to require payment for overtime at time and a half the regular pay, though that pay was above the statutory minimum, in order to induce work-sharing and relieve unemployment by reducing hours of work.[9]

Support for the "actual wage" theory can be found, first of all, in the Act itself. The text of Section 7(a) seems prima facie to indicate that it should be interpreted as a "maximum hour" provision rather than as a "minimum wage" provision. The section is labelled "Maximum Hours"[10] and is separated from the minimum wage section. Moreover, the words "minimum rate" would probably have been used if Congress had intended "regular rate" to mean "minimum rate";[11] and if the words "regular rate" meant "minimum rate," the words "at which he is employed" would appear meaningless and redundant.[12] The exemptions from Section 7(a),[13] moreover, can be regarded not as simply exempting the better paid workers but as designed to provide a comprehensive scheme of regulation of hours not connected with the Act's minimum wage provisions. Some evidence can

Act has been proposed which would permit averaging of an employee's working hours over periods longer than a single workweek. 5 WAGE & HOUR REP. 293 (1942).

7. 316 U. S. 572 (1942).

8. Although the rate so derived is not "regular" in the sense of remaining constant from week to week, it was held regular in the statutory sense because the rate per hour did not vary within the week. Note that under this view a worker has a rate of pay which is inversely proportional to the amount of time he works. The Court does not even mention the most objectionable feature of this theory, *i.e.*, that although a well-paid employee made no demand for additional compensation during an extended period after the Act became effective, he may now claim an extra reward for each hour of overtime as "compensation." Moreover, the amount of this compensation is directly proportional to the height of his salary so that the employer who has paid the highest salary is harmed most.

9. See Overnight Motor Transp. Co. v. Missel, 316 U. S. 572, 577 (1942).

10. 52 STAT. 1063 (1938), 29 U. S. C. § 207 (1940).

11. Haddad v. Beckerman Shoe Corp., 4 WAGE & HOUR REP. 329 (Pa. Com. Pl. 1941).

12. Compare United States v. American Trucking Ass'n, 310 U. S. 534, 543 (1940).

13. Those who must work intensively because of the character of their work are given limited exemptions in § 7(b) (employees in seasonal industries) and § 7(c) (employees engaged in work on perishable commodities). The hours of outside salesmen, executive and professional workers who are exempted by § 13(a)(1) are not amenable to a workweek of prescribed length. The remaining exemptions can be explained on the ground that the exempted employees are subject to other regulation; for § 13(b)(1) exempts those whose hours may be restricted by the Interstate Commerce Commission, and §§ 7(b) and 13(b)(2) exempt employees who work under collective bargaining agreements which meet certain specifications.

be found in the legislative history of the Act to show that a purpose of the law was to reduce hours of labor,[14] spread employment,[15] and impose a penalty on overtime work.[16]

Furthermore, the "actual wage" theory has the support of consistent administrative practice. The Wage and Hour Division has uniformly[17] maintained that the "actual wage" theory is the correct one,[18] and a large majority of the cases have accepted the Administrator's interpretation.[19] Regardless of

14. See Presidential messages given in 1937, reported in 1941 WAGE & HOUR MAN. 747 and 82 CONG. REC. 11 (1937). Congressional reports: SEN. REP. No. 884, 75th Cong., 1st Sess. (1937) 4, 7; H. R. REP. No. 1452, 75th Cong., 1st Sess. (1937) 14, 15; Conference Report, 1941 WAGE & HOUR MAN. 759, 761 (1938). Debates in Congress: 83 CONG. REC. 9177 (1938) (Sen. Walsh); 83 CONG. REC. 7428 (1938) (Rep. Connery); 83 CONG. REC. 7325 (1938) (Rep. Wolverton); 83 CONG. REC. 7315 (1938) (Rep. Mott); 83 CONG. REC. 7311 (1938) (Rep. Sirovich); 82 CONG. REC. 1676 (1937) (Rep. Shafer); 82 CONG. REC. 1480 (1937) (Rep. Dorsey); 82 CONG. REC. 1477 (1937) (Rep. Rutherford); 82 CONG. REC. 1470 (1937) (Rep. Jenks); 82 CONG. REC. 1415 (1937) (Rep. Curley); 81 CONG. REC. 7802 (1937) (Sen. Maloney); 81 CONG. REC. 7791 (1937) (Sen. Bridges); 81 CONG. REC. 7779 (1937) (Sen. Austin); 81 CONG. REC. 7651 (1937) (Sen. Walsh).

15. The Presidential message of May 24, 1937, expressed the hope that employment might be spread "among those groups in which unemployment today principally exists." 1941 WAGE & HOUR MAN. 747, 749. Some references in the debates also express the hope that employment will be spread. See 83 CONG. REC. 9263 (1938) (Rep. Dunn); 83 CONG. REC. 9176 (1938) (Sen. Walsh); 83 CONG. REC. 7428 (1938) (Reps. Connery and Patrick); 83 CONG. REC. 7325 (1938) (Rep. Wolverton); 83 CONG. REC. 7323 (1938) (Rep. DeMuth); 83 CONG. REC. 7278 (1938) (Rep. O'Connor); 82 CONG. REC. 1490 (1937) (Rep. Teigan); 82 CONG. REC. 1486 (1937) (Rep. Wood); 82 CONG. REC. 1478 (1937) (Rep. Dorsey); 82 CONG. REC. 1477 (1937) (Rep. Rutherford); 82 CONG. REC. 1470 (1937) (Rep. Jenks); 82 CONG. REC. 1415 (1937) (Rep. Curley); 81 CONG. REC. 7941 (1937) (Sen. Barkley); 81 CONG. REC. 7848 (1937) (Rep. Healey); 81 CONG. REC. 7746 (1937) (Sen. Black). Most of these references are coupled with a denunciation of subsistence wages, and thus leave it unclear whether the overtime provisions of the Act were meant to apply to all workers or only those who are poorly paid.

16. See 82 CONG. REC. 1697 (1937) (Rep. Smith); 81 CONG. REC. 7655 (1937) (Sen. Walsh).

17. There was one exception, for the first Administrator remarked before the Act went into effect that clerical employees earning more than the minimum wage would not be affected by the Act because the weekly wage could be taken to include overtime compensation. 3 WAGE & HOUR REP. 228 (1938).

18. Interpretative Bulletin No. 4 has gone through many revisions, but this particular provision has never been changed. See Interpretative Bulletin No. 4, 1941 WAGE & HOUR MAN. 127, 128–129. The interpretative bulletins do not have the force of law. See Overnight Motor Transp. Co. v. Missel, 316 U. S. 572, 580, n. 17 (1942), which cites United States v. American Trucking Ass'n, 310 U. S. 534, 549 (1940), and Graves v. Armstrong Creamery Co., 154 Kan. 365, 370, 118 P. (2d) 613, 616 (1941). They merely express the Division's construction of the Act. See Att'y Gen. Comm. Ad. Proc., *Administration of the Fair Labor Standards Act of 1938*, SEN. DOC. No. 10, Pt. 1, 77th Cong., 1st Sess. (1941) 71–72. But they have received great respect from the courts.

19. Aside from the Supreme Court's opinion in the *Missel* case, perhaps the best opinions of the approximately thirty rulings in which the Administrator's interpretation

the employee's rate of pay, these courts have felt that Section 7 burdens the employer with increased expense as a penalty for overtime.

In *Walling v. A. H. Belo Corporation*,[20] however, the Court, by a five-to-four vote, relied on the "agreed-upon" theory. That case involved an employment agreement which was entered into after enactment but before the effective date of the Act, clearly in order to avoid the extra expense of overtime compensation. The agreement provided for a basic hourly rate of 67 cents for the first 44 hours,[21] and for each hour thereafter "not less than one and one-half time[s] such basic rate . . . with a guaranty . . . that you shall receive weekly, for regular time and for such overtime as the necessities of the business shall demand, a sum not less than . . . $40."[22] Although the hourly rate was set lower than the rate which would be obtained by dividing the employee's guaranteed weekly salary by the number of hours which he worked during the week,[23] the Court held that the basic rate specified might be established by contract as the regular rate of pay on which overtime was to be computed. By denying any prohibitory effect to Section 18,[24] which states that no employer shall be justified by any provision of the Act in reducing a wage exceeding the minimum, the Court made it clear that an employer could contract with his employees to pay them the same wages that they had received previously.[25]

has been accepted are: Missel v. Overnight Motor Transp. Co., 126 F. (2d) 98 (C. C. A. 4th, 1942); Carleton Screw Products Co. v. Fleming, 126 F. (2d) 537 (C. C. A. 8th, 1942); Bumpus v. Continental Baking Co., 124 F. (2d) 549 (C. C. A. 6th, 1941), *cert. denied*, 316 U. S. 704 (1942); Hall v. Warren-Bradshaw Drilling Co., 124 F. (2d) 42 (C. C. A. 5th, 1941), *aff'd*, 63 Sup. Ct. 125 (U. S. 1942); Fleming v. Pearson Hardwood Flooring Co., 39 F. Supp. 300 (E. D. Tenn. 1941); Tidewater Optical Co. v. Wittkamp, 179 Va. 545, 19 S. E. (2d) 897 (1942). See also Williams v. General Mills, 39 F. Supp. 849, 851-852 (N. D. Ohio 1941).

20. 316 U. S. 624 (1942).

21. The Act provided that the maximum number of hours per week was to be 44 until October 23, 1939, 42 from that date until October 23, 1940, and 40 hours thereafter. 52 STAT. 1063 (1938), 29 U. S. C. § 207 (1940).

22. Walling v. A. H. Belo Corp., 316 U. S. 624, 628 (1942).

23. For example, if the employee worked 46 hours a week, on the basis of his hourly rate he would be entitled to (44 x 67 cents) + (2 x $1.00) or $31.48; whereas under the weekly guarantee he received $40. Note, however, that if the employee should work 60 hours, he would be entitled to (44 x 67 cents) + (16 x $1.00) or $45.48.

24. 52 STAT. 1069 (1938), 29 U. S. C. § 218 (1940).

25. Some courts had held previously that such an agreement was illegal. Williams v. General Mills, 39 F. Supp. 849 (N. D. Ohio 1941); Murray v. Noblesville Milling Co., 5 WAGE & HOUR REP. 55 (S. D. Ind. 1942); *accord*, McLendon v. Bewley Mills, 4 WAGE & HOUR REP. 30 (N. D. Tex. 1941); Fleming v. Atlantic Co., 40 F. Supp. 654 (N. D. Ga. 1941). *Contra:* Remer v. Czaja, 36 F. Supp. 629 (D. Md. 1941); White v. Witwer Grocer Co., 4 WAGE & HOUR REP. 615 (N. D. Iowa 1941). Now § 18 has been reduced to the status of a "pious wish." Not only had it been previously contended that this was all § 18 amounted to [see statement of Administrator Andrews, 3 LAB. REL. REP. 194 (1938), and statement of E. E. Little, Wage-Hour Consultant, 4 WAGE & HOUR REP. 648 (1941)], but also Congress had indicated that § 18 was not to be given the legal effect that a literal reading would seem to justify by neither including violations of § 18 among the prohibitions of § 15(a) [52 STAT. 1068 (1938),

The arguments in support of the "agreed-upon" theory have their basis in the convictions that the employee should receive a stable weekly compensation, and that since all rates of pay have their ultimate basis in the agreement of employer and employee,[26] it is unwise to reform a bona fide employment agreement. In cases where the employee receives less than the statutory minimum, the agreement cannot be considered bona fide; and in such situations the employee may have his overtime compensated not on the basis of the "agreed-upon" rate but rather as one and one-half times the statutory minimum.[27] But it is contended that where the rate specified is above the legal minimum and bears sufficient relation to the work performed by the employee to eliminate the possibility of its being fictitious,[28] it is unwise to impose another rate. Businessmen and some members of Congress have echoed the view expressed in the *Belo* opinions that, if freedom of contract above a floor prescribed by law is supplanted by everlastingly multiplying administrative regulation, efficient economic adjustment will be hampered.[29] In fact, in several bills which were proposed before the Fair Labor Standards Act was adopted the compensation for overtime was "one and one-half times the *agreed* wage at which he was employed."[30] Since an employer knows his business better than anyone else, it is argued, he ought to be allowed the utmost freedom in drawing up a system of compensation, subject only to voluntary acceptance by his employees.[31]

The "agreed-upon" theory of Section 7(a) involves taking a limited view of the purpose of the Act — *i.e.*, that substandard wages rather than excessive hours per se were the principal evil aimed at. The primary purpose of the Act was to aid the underprivileged,[32] and the well-paid worker who

29 U. S. C. § 215 (1940)], nor prescribing penalties under § 16 [52 STAT. 1069 (1938), 29 U. S. C. § 216 (1940)].

26. See Williams v. Jacksonville Terminal Co., 315 U. S. 386, 397-398 (1942).

27. Drave v. Hirsch, 40 F. Supp. 290 (N. D. Ga. 1941); Fleming v. Knox, 42 F. Supp. 948 (S. D. Ga. 1941); Angel v. Dayton Veneer & Lumber Mills, 4 WAGE & HOUR REP. 471 (M. D. Ga. 1941).

28. The first reason given by the Supreme Court for supporting the *Belo* employment agreement was that the employee became entitled to a greater compensation under the basic hourly rate than under the weekly guaranty whenever he worked more than 54½ hours in any one week. Walling v. A. H. Belo Corp., 316 U. S. 624, 631-632 (1942).

29. For example, see 81 CONG. REC. 7724 (1937) (Sen. Vandenberg). For a vitriolic expression of this philosophy, see opinion of District Judge Atwell in the *Belo* case. 36 F. Supp. 907, 909 (N. D. Tex. 1941).

30. See original bills in House and Senate—S. 2475, 75th Cong., 1st Sess. (1937) [introduced, 81 CONG. REC. 4954 (1937)], and H. R. 7200, 75th Cong., 1st Sess. (1937) [introduced, 81 CONG. REC. 4998 (1937)]—and the substitute bill approved by the House Committee and offered as an amendment on the floor of the House on December 15, 1937 [82 CONG. REC. 1576 (1937)]. (emphasis added).

31. There must be no taint of coercion. See, *e.g.*, Fleming v. Atlantic Co., 40 F. Supp. 654 (N. D. Ga. 1941); Murray v. Noblesville Milling Co., 5 WAGE & HOUR REP. 55 (S. D. Ind. 1942).

32. The child labor and minimum wage provisions of the Act, as well as the innumerable references in the debates to the ill-fed, exploited, submerged third of the workers who are forced to live at a subsistence level, tend to show this.

must work long hours to earn his high pay is less in need of protection. Although the Supreme Court in the *Belo* case did not discuss the basic purpose of Section 7(a), the Fifth Circuit Court of Appeals in the same case stated:

> "Section 7 . . . does not at all fix maximum hours. . . . The purpose of the Act is to establish and gradually raise minimum wages . . . the overtime provisions in it are inserted not at all to discourage or limit overtime but as a part of the scheme to raise substandard wages. . . ."[33]

Since presumably a statute should be construed to effectuate the purpose which Congress primarily desired, this limited view can easily be justified.

The same limited view would sustain a thoroughgoing "minimum wage" theory. Then the minimum wage and maximum hours provisions would be viewed as conjunctive parts of one law, not as independent provisions of two separate laws designed to achieve the separate purposes of (1) a floor on wages for a limited class and (2) a ceiling on hours for an unlimited class.[34] The "minimum wage" theory is supported by the declaration of policy of the Act, which states that it is aimed at labor conditions detrimental to the maintenance of a minimum standard of living;[35] by Section 8(a), which mentions *the* objective of a universal minimum wage;[36] and by the legislative history of the Act, which shows that it was designed for the protection of the unorganized and unskilled.[37] Since Congress abandoned

33. 121 F. (2d) 207, 211, 212 (C. C. A. 5th, 1941). Cases relying on this opinion are: Fleming v. Stone, 41 F. Supp. 1000 (N. D. Ill. 1941); Schlee v. Lincoln Oil Co., 5 WAGE & HOUR REP. 72 (Mich. C. C. 1941); Missel v. Overnight Transp. Co., 40 F. Supp. 174 (D. Md. 1941), *rev'd*, 126 F. (2d) 98 (C. C. A. 4th, 1942), *Circuit Court aff'd*, 316 U. S. 572 (1942); Keegan v. Ruppert, 4 WAGE & HOUR REP. 712 (S. D. N. Y. 1941), *rev'd*, 5 WAGE & HOUR REP. 310 (S. D. N. Y. 1942). A few other courts have taken the same view. Floyd v. DuBois, 5 WAGE & HOUR REP. 307 (Ohio Sup. Ct. 1942), *rev'g* 4 WAGE & HOUR REP. 77 (Ohio Com. Pl. 1941); Ritchey v. Skelly Oil Co., 5 WAGE & HOUR REP. 258 (D. New Mex. 1942); White v. Witwer Grocer Co., 4 WAGE & HOUR REP. 615 (N. D. Iowa 1941); Reeves v. Howard County Refining Co., 33 F. Supp. 90 (N. D. Tex. 1940); Gurtov v. Volk, 170 Misc. 322, 11 N. Y. S. (2d) 604 (N. Y. City Cts. 1939).

34. This argument is elaborated in Brief for Petitioner, Overnight Motor Transp. Co. v. Missel, 316 U. S. 572 (1942). Section 7(a) would relate to those persons governed by the minimum wage provisions of § 6, and because of the overtime penalty employment would be spread among the same workers protected by § 6.

35. Section 2(a), 52 STAT. 1060 (1938), 29 U. S. C. § 202 (1940).

36. 52 STAT. 1064 (1938), 29 U. S. C. § 208(a) (1940).

37. See Presidential messages: 1941 WAGE & HOUR. MAN. 747 (1937), and 82 CONG. REC. 11 (1937). SEN. REP. No. 884, 75th Cong., 1st Sess. (1937), H. R. REP. No. 1452, 75th Cong., 1st Sess. (1937), and the 1938 Conference Report, 1941 WAGE & HOUR MAN. 759, stress the dangers of wages too low to buy the bare necessities of life and of long hours of work injurious to health. The debates in Congress also bring this out. 82 CONG. REC. 1390 (1937) (Rep. Norton); 83 CONG. REC. 9258 (1938) (Rep. Randolph); 83 CONG. REC. 9177 (1938) (Sen. Walsh); 83 CONG. REC. 7291 (1938) (Rep. Allen); 83 CONG. REC. 7283 (1938) (Rep. Curley); 82 CONG. REC. 1825

a Board with wider statutory powers for an Administrator with little discretion, a limited law in indicated.[38] Moreover, it can be contended that by voting down[39] the Maloney amendment,[40] which would have established a workweek whose length would have been inversely proportional to the amount of unemployment, Congress rejected the spread-work policy which was read into the Act by the "actual wage" theory of the *Missel* case as applying to all workers regardless of salary.

Orthodox economic theory supports the minimum wage viewpoint.[41] Most economists recognize that economic laws are not so inexorable that hours should not be curtailed for reasons of health. But they argue that the fallacies of regulation unrelated to the worker's health lie in assuming a quantum of work, in assuming that more workers will be hired, and in failing to realize that a higher price resulting from increased labor cost may cause a drop in the volume of sales. Reflection of this view in Congress has been indicated by the introduction of several bills which would exempt well-paid employees from the Act[42] and by the proposal of two amendments to the Act in support of the "agreed-upon" theory.[43]

That the arguments for any one theory are not so conclusive as to foreclose all other interpretations is apparent from the conflict between the

(1937) (Rep. Voorhis); 82 CONG. REC. 1671 (1937) (Rep. Keller); 82 CONG. REC. 1591 (1937) (Rep. Norton); 82 CONG. REC. 1505 (1937) (Rep. Sirovich); 81 CONG. REC. 7800 (1937) (Sen. Walsh); 81 CONG. REC. 7651 (1937) (Sen. Black).

38. This change in the character of the law is traced in Forsythe, *Legislative History of the Fair Labor Standards Act* (1939) 6 LAW & CONTEMP. PROB. 464, 478–487.

39. 81 CONG. REC. 7954 (1937).

40. 81 CONG. REC. 7953 (1937).

41. KOONTZ, GOVERNMENT CONTROL OF BUSINESS (1941) 695–712; LESTER, THE ECONOMICS OF LABOR (1941) cc. 7, 8, 13; Sargent, *Economic Hazards in the Fair Labor Standards Act* (1939) 6 LAW & CONTEMP. PROB. 422, 423, 424, 428; *cf.* Douglas, *The Economic Theory of Wage Regulation* (1938) 5 U. OF CHI. L. REV. 184, 203 *et seq.* Douglas concluded that if wages are pushed up above the point of marginal productivity the decrease in employment would normally be from 3 to 4 times as great as the increase in hourly rates, so that the total income of the working class would be reduced. *Contra:* Black, *The Shorter Work Week and Work Day* (1936) 184 ANNALS 62–67.

42. H. R. 4363, 76th Cong., 1st Sess. (1939), a bill to exempt clerical employees employed on a straight salary basis, was introduced Feb. 21, 1939. 84 CONG. REC. 1723 (1939). H. R. 4645, 76th Cong., 1st Sess. (1939), a bill to exempt clerical employees, writers, and reporters receiving more than $1,200 per year, was introduced March 1, 1939. 84 CONG. REC. 2115 (1939). Again on May 2, 1940, an amendment was offered to exempt monthly salaried employees who receive more than the minimum wage established by § 6. 86 CONG. REC. 5455 (1940).

43. S. 1015, 77th Cong., 1st Sess. (1941), provides that the Act shall not be interpreted to require payment of a greater amount of wages than agreed between employer and employee, provided the agreement specifies a regular rate of pay not less than the statutory minimum and requires regular overtime rate; additional compensation not to be counted as part of regular rate for purpose of computing overtime. 4 WAGE & HOUR REP. 164 (1941). H. R. 5268, 77th Cong., 1st Sess. (1941), provides that any "compensation, bonus, guaranty, benefit" granted an employee in addition to the regular rate of pay should not be deemed as increasing the regular rate of pay for the purpose of calculating overtime under § 7(a). 87 CONG. REC. 6040 (1941).

"agreed-upon" theory of the *Belo* case and the "actual wage" theory of the *Missel* case. The two cases are easily distinguishable on their facts, since the *Belo* contracts contained an expressly stipulated hourly rate while the agreement in the *Missel* case did not. But the policy of flexibility stressed in the *Belo* case is not furthered by forcing an employer to pay extra compensation for overtime rather than assuming that both overtime and straight time are included in a fixed salary. Nor is the *Belo* decision logically reconcilable with the spread-work policy of the Act declared in the *Missel* case.

Two contrasting hypothetical situations may illustrate this conflict and bring out the anomalous results which may ensue from these decisions. *A*, an employer, hires *B* for $80 a week. *B*'s hours fluctuate and nothing is said about extra compensation for hours over 40. Both know that hours are likely to be considerably over 40. If *B* works 50 hours, he will be entitled to $88 for that week.[44] This reformation by law of a high wage, at the expense of the employer, hardly carries out the objective of flexibility which was emphasized in the *Belo* case; yet it is the result obtained by the use of the "actual wage" theory.

On the other hand, if *X* employs *Y* under an employment contract providing for 40 cents an hour for the first 40 hours each week and not less than 60 cents for each hour thereafter, with a guarantee of $40 a week "for regular time and such overtime as the necessities of the business demand," *Y* may have to work 80 hours. Certainly *Y* will not become entitled to any extra compensation till he works more than 80 hours.[45] The most important result is that there is no increase in the labor cost to *X* from 40 to 80 hours.[46] Such a contract as that between *X* and *Y* seems clearly legal under the "agreed-upon" theory of regular rate adopted in the *Belo* case. Yet it is apparent that the purpose of the Act expressed in the *Missel* case is thereby frustrated. Consequently, only the employer who is uninformed of this means of avoidance or who is restricted by extra-legal pressure[47] will be affected by the Act's overtime provisions. Thus under the "agreed-upon" theory, as the Administrator predicted prior to the decision in the *Belo* case,[48] the effect of the overtime provisions seems to be virtually nullified.

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44. Regular rate $= \frac{\text{salary}}{\text{no. of hours worked}}$, or regular rate $= \frac{80}{50}$; hence regular rate = $1.60 per hour and employee's compensation = (40 x 1.60) + (10 x 2.40).

45. Because 40 hours at regular time equals $16 and 40 hours at time and a half equals $24. Hence the employee might have to work 80 hours to earn his $40 guarantee.

46. The counterbalancing factor is, of course, that the employer may pay more than is legally required if the employee works only a few more hours than 40. For example, if he worked 44 hours, he would receive $16 (40 cents per hour) for the first 40 hours and $24 for the four hours of overtime ($6 per hour!). The majority in the *Belo* case saw nothing illegal in this since the Act reads "not less than" time and a half for each hour of overtime. 52 STAT. 1063 (1938), 29 U. S. C. § 207 (1940).

47. This is most likely to appear in the guise of union resistance. An employer who persisted in his attempt to make individual agreements with his employees over the objection of the union would lay himself open to the charge of unfair labor practices under the National Labor Relations Act. 49 STAT. 449 (1935), 29 U. S. C. § 151 (1940). Where the labor market is favorable to the worker, even unorganized workers might block the adoption of such a plan by refusing their consent.

48. 5 WAGE & HOUR REP., Supp. to No. 24, at 4 (1942).

Since the Fair Labor Standards Act is a permanent measure with a broad coverage[49] which will become increasingly important,[50] the phrase "regular rate" should be given a meaning which will make it possible for an employer to avoid the severe penalties[51] for violating the Act and for the courts to enforce a logical, consistent policy. Three possible paths lie open. In order to reach the desired goal of consistency, the policy of the *Missel* case can be reversed by a return to the "minimum wage" theory. Or the "agreed-upon" theory of the *Belo* case can be rejected in favor of the Administrator's "actual wage" theory. Since in *Warren-Bradshaw Drilling Company v. Hall*[52] the Supreme Court followed the *Missel* case, yet did not reject the *Belo* holding, both of these courses appear unlikely. Finally, the law can be left in its present state. Then, since the "agreed-upon" theory of regular rate will probably be accepted if the hourly rate expressed in the contract is not an arbitrary figure unrelated to the true employment agreement, each employment arrangement coming before a court will have to undergo the closest scrutiny.

49. The number of employees who are covered by the Act and work more than 40 hours today probably exceeds greatly the conservative estimate of 2,184,000 made by Professor Daugherty. Daugherty, *The Economic Coverage of the Fair Labor Standards Act* (1939) 6 LAW & CONTEMP. PROB. 406, 407. Because the Act uses vague language, because the number of workers covered by exemptions is not clear, and because the test of the coverage is not the nature of the employer's business but the duty of the particular employee [Kirschbaum v. Walling, 316 U. S. 517 (1942)], it is difficult to ascertain the exact number of employees who are covered.

50. There are at least three reasons why its importance will grow. First, many firms now working on government contracts will cease to be covered by the Walsh-Healey Act [49 STAT. 2036-2037 (1936), 41 U. S. C. § 35 (1940)] after the war, and the concomitant overtime provisions of that statute will be superseded by the Fair Labor Standards Act. Second, the minimum wage required by the FLSA rises in 1945 to 40 cents per hour. 52 STAT. 1062 (1938), 29 U. S. C. § 206 (1940). Third, the bargaining power of labor is likely to shrink if the predicted slackening of business tempo occurs, so that many workers protected by union contracts at present are likely to lose this protection.

51. The *Missel* case makes it clear that § 16(b) of the Act, which provides that an employer "shall be liable" to the employee for all unpaid overtime compensation plus an additional equal amount as liquidated damages, is mandatory. 316 U. S. 572, 581-582. Since good faith and unintentional violation will not relieve an employer from this penalty, the result of the *Missel* case is to warn employers to live up to the Act if there is any doubt as to whether an employee is covered. This policy of adding every possible incentive to gain full compliance by the employer is further strengthened by the statutory provision that an unsuccessful employer must pay costs and a reasonable attorney's fee. 52 STAT. 1069 (1938), 29 U. S. C. § 216 (1940). A "reasonable" fee may not be a small fee. Asaro v. Lilienfeld, 5 WAGE & HOUR REP. 556 (N. Y. City Cts. 1942); Magann v. Long's Baggage Transfer Co., 39 F. Supp. 742 (W. D. Va. 1941); Lewis v. Nailling, 36 F. Supp. 187 (W. D. Tenn. 1940).

52. 63 Sup. Ct. 125, 127 (U. S., Nov. 9, 1942), *aff'g* 124 F. (2d) 42 (C. C. A. 5th, 1941). Although the employees involved had accepted a flat hourly wage which was greater than the statutory minimum plus overtime for the hours worked, the Court held that no waiver of extra compensation for overtime should be implied.

USE OF TAXATION AND LICENSING IN THE SUPPRESSION OF FREEDOM OF RELIGION AND THE PRESS*

THE early struggle for freedom of religion and the press in both England and the United States was to a large extent directed against licensing and taxation. In the suppression of religious freedom, licensing was employed to prevent the dissemination of unorthodox ideas[1] and taxation to provide for the support of one religion or sect in preference to others.[2] To control the press, a system of licensing was used to maintain a strict censorship in England during the sixteenth and seventeenth centuries and in America during the seventeenth and eighteenth centuries.[3] After the expiration in 1694 of the last English licensing act, the taxes on knowledge were instituted, and these were not abolished until 1855.[4] These taxes, which were embodied in the Stamp Acts in America, were imposed on the circulation of printed papers, pamphlets, and periodicals. They were designed for revenue,[5] but in practice served as a restriction on the distribution of ideas, for only the wealthy could afford to pay them. The abhorrence of the colonists for these techniques of repression was in large measure responsible for the guaranties of religious freedom and freedom of the press in the First Amendment.

Two kinds of constitutional problems have arisen in the enforcement of these guaranties. When literature or religious practices are inherently objectionable, constitutional questions are raised by their direct suppression. This suppression is justifiable if the literature or practices are offensive to the public morals or constitute some "clear and present danger" to organized society.[6] On the other hand, when the literature or practices are not inherently objectionable, constitutional issues are most often raised by interferences incidental to the performance of ordinary governmental functions. For a valid purpose a state[7] or a municipal corporation[8] may be general, nondiscriminatory legislation impose a slight inconvenience on the enjoyment

* Jones v. Opelika, Bowden v. Fort Smith, Jobin v. Arizona, 316 U. S. 584 (1942).

1. See Michael, *Freedom of the Press Under Our Constitution* (1926) 33 W. VA. L. Q. 29.

2. See Reeder, *A Monograph on Religious Freedom* (1925) 31 W. VA. L. Q. 192.

3. See PATERSON, LIBERTY OF THE PRESS AND SPEECH (1880) 44, 46, 77; Willis, *Freedom of Speech and of the Press* (1929) 4 IND. L. J. 445; Michael, *loc. cit. supra* note 1.

4. For a full discussion of these taxes, see COLLET, HISTORY OF THE TAXES ON KNOWLEDGE (1899).

5. See 1 *id.* 8.

6. For a discussion of this kind of suppression, see Reynolds v. United States, 98 U. S. 145 (1878); Comment, *Legal Techniques for the Protection of Free Discussion in Wartime* (1942) 51 YALE L. J. 798; (1928) 41 HARV. L. REV. 525.

7. Religious freedom and freedom of the press are protected from the encroachment not only of the federal government by the First Amendment but also of the state governments by the Fourteenth. Cantwell v. Connecticut, 310 U. S. 296 (1940); Near v. Minnesota, 283 U. S. 697 (1931).

8. Municipal ordinances are state actions. Schneider v. State, 308 U. S. 147 (1939); Cuyahoga River Power Co. v. Akron, 240 U. S. 462 (1916); Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278 (1913).

of freedom of religion and the press. In the interest of public safety, peace, comfort, or convenience, it may regulate such an exercise of religion as a public parade.[9] For similar reasons it may regulate the time, place, or manner of distribution or sale of literature.[10] In doing this it may establish a system of licensing and charge a nominal fee to meet the expenses of its administration, as long as the issuance of a license on request is mandatory.[11] These regulations may not prohibit any practice of religion or the distribution or sale of literature;[12] nor may any previous restraint be imposed on the enjoyment of these freedoms, either by a system of licensing or taxation or by any other means.[13]

Despite these principles licensing and taxation may still suppress freedom of religion and the press under the ruling of the United States Supreme Court in a recent five-to-four decision.[14] Members of the religious sect of Jehovah's Witnesses were convicted under ordinances of three municipalities for distributing their literature without procuring a license. These ordinances required the taking out of a license and the payment of a license fee or privilege tax by persons engaged in any business. No discretionary power to refuse a license was granted by any of the ordinances, but the city of Opelika made all licenses subject to revocation at the discretion of the City

9. Cox v. New Hampshire, 312 U. S. 569 (1941); Shapiro v. Lyle, 30 F. (2d) 971 (W. D. Wash. 1929); Hamilton v. Montrose, 124 P. (2d) 757 (Colo. 1942).

10. Buxbom v. Riverside, 29 F. Supp. 3 (S. D. Cal. 1939); Chicago v. Rhine, 363 Ill. 619, 2 N. E. (2d) 905 (1936); Commonwealth v. Pascone, 308 Mass. 591, 33 N. E. (2d) 522 (1941); People v. Bohnke, 287 N. Y. 154, 38 N. E. (2d) 478 (1941); see Schneider v. State, 308 U. S. 147, 165 (1939). If the regulation is a valid one, the purpose of the distribution or sale is immaterial. Mobile v. Kiernan, 170 Ala. 449, 54 So. 102 (1911); Cook v. Harrison, 180 Ark. 546, 21 S. W. (2d) 966 (1929); Commonwealth v. Anderson, 272 Mass. 100, 172 N. E. 114 (1930); Pittsburgh v. Ruffner, 134 Pa. Super. 192, 4 A. (2d) 224 (1939). *Contra:* Gregg v. Smith, L. R. 8 Q. B. 302 (1873).

11. Manchester v. Leiby, 117 F. (2d) 661 (C. C. A. 1st, 1941), *cert. denied*, 313 U. S. 562 (1941). For what constitutes a reasonable fee, see Note (1925) 39 A. L. R. 1385.

12. Freedom of the press includes liberty of circulation as well as of publication. It is not confined to newspapers and periodicals but extends to every character of publication affording a vehicle of information and opinion. Lovell v. Griffin, 303 U. S. 444, 452 (1938).

13. Cantwell v. Connecticut, 310 U. S. 296 (1940); Schneider v. State, 308 U. S. 147 (1939); Lovell v. Griffin, 303 U. S. 444 (1938); Kennedy v. Moscow, 39 F. Supp. 26 (D. Idaho 1941) (award of license conditional on applicant's saluting the flag); Reid v. Borough of Brookville, 39 F. Supp. 30 (W. D. Pa. 1941); South Holland v. Stein, 373 Ill. 472, 26 N. E. (2d) 868 (1940); Cincinnati v. Mosier, 61 Ohio App. 81, 22 N. E. (2d) 418 (1939). For a review of the cases on religious solicitations, see 84 Rep. Nat. Institute of Municipal Law Officers (1942) 9. And see Near v. Minnesota, 283 U. S. 697 (1931).

14. Jones v. Opelika, Bowden v. Fort Smith, Jobin v. Arizona, 316 U. S. 584 (1942). For the opinions in the lower courts, see Jones v. Opelika, 241 Ala. 279, 3 So. (2d) 76 (1941), 242 Ala. 549, 7 So. (2d) 503 (1942); Cole v. Fort Smith, 202 Ark. 614, 151 S. W. (2d) 1000 (1941); State v. Jobin, 118 P. (2d) 97 (Ariz. 1941).

Commission. When the ordinances were applied to them, the Witnesses were practicing their religion in their customary manner. Following strictly the admonition of the New Testament,[15] they were spreading the Gospel from house to house. After receiving permission from the householder, they would play phonograph records for him and offer him books or pamphlets advocating their views. For these tracts they would ask payment of a nominal sum as a contribution to their cause, but if the householder was unwilling or unable to pay, they would give him the literature free.[16] The books and pamphlets were published by non-profit corporations organized by the Witnesses, and the funds collected were used for the support of the religious movement. In an opinion aptly characterized by the Chief Justice as irrelevant,[17] Mr. Justice Reed, speaking for a majority of five,[18] described the "sales as partaking more of commercial than religious or educational transactions."[19] And so the ordinances, as applied to the activities of the Witnesses, were said to be a valid exercise of the state's power to tax for its own support.[20] The Court refused to consider the revocability section of the Opelika ordinance or the amount of the fees, since there was no application for a license and no claim that the fees constituted a substantial burden on the activities of the Witnesses. The ordinances in these cases involve both licensing and taxation, and the question presented is to what extent a state may constitutionally require either the taking out of a license or the payment of a tax, or both, for the practice of religion[21] or the dissemination of ideas.

15. MATT. 10:11-14, 24:14; LUKE 9:1-16. For a description of the Witnesses' beliefs and practices, see (1941) 16 ST. JOHN'S L. REV. 108. For the history of this religious movement, see AMERICAN CIVIL LIBERTIES UNION, RELIGIOUS LIBERTY IN THE U. S. TODAY (1939) 18; Southworth, *Jehovah's 50,000 Witnesses* (1940) 151 NATION 110.

16. In the *Opelika* case the activities of the Witnesses were confined to distribution of literature and solicitation of funds on the streets.

17. 316 U. S. at 604.

18. Dissenting opinions were filed by three of the Justices. Mr. Chief Justice Stone's dissent (316 U. S. at 600) was concurred in by Justices Black, Douglas, and Murphy; Mr. Justice Murphy's dissent (316 U. S. at 611) was concurred in by Chief Justice Stone and Justices Black and Douglas; and in addition there was a special dissenting memorandum by Mr. Justice Black (316 U. S. at 623), concurred in by Justices Douglas and Murphy, to repudiate their former approval of Minersville School Dist. v. Gobitis, 310 U. S. 586 (1940) (see pp. 174-175 *infra*).

19. 316 U. S. at 598.

20. Prior to the principal case, most of the state court decisions invalidated such taxes. See, for example, Blue Island v. Kozul, 379 Ill. 511, 41 N. E. (2d) 515 (1942); Tucker v. Randall, 18 N. J. Misc. 675, 15 A. (2d) 324 (Sup. Ct. 1940); People v. Banks, 168 Misc. 515, 6 N. Y. S. (2d) 41 (N. Y. City Cts. 1938); Commonwealth v. Reid, 144 Pa. Super. 569, 20 A. (2d) 841 (1941); State v. Greaves, 112 Vt. 222, 22 A. (2d) 497 (1941); McConkey v. Fredericksburg, 179 Va. 556, 19 S. E. (2d) 682 (1942).

21. Although the Court assumed that the Witnesses' activities were of a commercial nature, it discussed at length the nature of civil liberties and the balance between governmental interests and individual freedom. In his dissent Mr. Justice Murphy pointed out that the Witnesses were engaged not in a commercial enterprise but in the practice of their religion. See 316 U. S. at 612. The argument is more completely stated in the dissenting opinion of Judge Rutledge in Busey v. District of Columbia, 129 F. (2d) 24, 28 (App. D. C. 1942). Some cases have held ordinances worded similarly to those in the principal case not applicable to the activities of the Witnesses: Donley v. Colorado

The license requirement in the Opelika ordinance would appear, as the Chief Justice argued in his dissent,[22] to be an unconstitutional restraint on freedom of religion and the press. For, although the issuance of a license is contingent only upon the payment of the annual tax and issuance fee, a license once issued is revocable in the uncontrolled discretion of the City Commission. If, as the Court has stated, a license may not be required when its award is contingent upon the whim of an administrative tribunal or officer,[23] it should not be required when its retention is contingent upon that same whim.[24] In both cases the imposition on the freedoms is the same. If the Court had considered the power of revocation granted by the Opelika ordinance, it could hardly have avoided these conclusions. But Mr. Justice Reed chose to avoid the question by declaring that the Witnesses could not challenge this section because they had not applied for a license, and that in any case the validity of the section could not be considered until the power of revocation had been exercised. This view would appear to be contrary to established principles. A licensing statute which is a lawful exercise of regulatory powers may not be attacked in anticipation of its improper administration. But when a statute is invalid on its face, this rule for obvious reasons does not apply.[25] "The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands."[26] If under the severability clause of the ordinance the revocation section could be set aside, the rest of the statute might be deemed valid, and the result reached by the Court upheld on different grounds. However, this section seems to be so much a part of the general licensing provisions that it cannot be separated from them, and therefore it should render the entire ordinance, as applied to the Witnesses, void on its face.[27] In addition, the Supreme Court itself has recently held that when a state court applies an ordinance as written and does not pass on the effect to be given a severability clause included in it, the Court in reviewing the decision must do likewise and determine the constitutionality of the ordinance as it stands.[28]

Springs, 40 F. Supp. 15 (D. Colo. 1941); State *ex rel.* Hough v. Woodruff, 147 Fla. 299, 2 So. (2d) 577 (1941); Thomas v. Atlanta, 59 Ga. App. 520, 1 S. E. (2d) 593 (1939); State *ex rel.* Semansky v. Stark, 196 La. 307, 199 So. 129 (1940); State v. Meredith, 197 S. C. 351, 15 S. E. (2d) 678 (1941); see also People v. Finkelstein, 170 Misc. 188, 9 N. Y. S. (2d) 941 (N. Y. City Cts. 1939); People v. Johnson, 117 Misc. 133, 191 N. Y. Supp. 750 (N. Y. City Cts. 1921).

22. 316 U. S. at 601-602.

23. Schneider v. State, 308 U. S. 147 (1939); Lovell v. Griffin, 303 U. S. 444 (1938).

24. So held in Herder v. Shahadi, 125 N. J. L. 153, 14 A. (2d) 475 (Sup. Ct. 1940).

25. Smith v. Cahoon, 283 U. S. 553 (1931); Lehon v. Atlanta, 242 U. S. 53 (1916); see also Thornhill v. Alabama, 310 U. S. 88, 97 (1940); Lovell v. Griffin, 303 U. S. 444 (1938). But see United States *ex rel.* Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U. S. 407, 416 (1921).

26. 316 U. S. at 602.

27. See Williams v. Standard Oil Co. of La., 278 U. S. 235 (1929).

28. Skinner v. Oklahoma *ex rel.* Williamson, 316 U. S. 535 (1942). The state court decisions did not consider the severability clause. See Jones v. Opelika, 241 Ala. 279, 3 So. (2d) 76 (1941), 242 Ala. 549, 7 So. (2d) 503 (1942).

Moreover, other questions may be raised, without reference to the revocability section in the Opelika ordinance, as to the validity of the mandatory licensing requirements in all three ordinances.[29] If they are considered as regulatory measures, the ordinances are open to challenge not because of the way they regulate, but because there was no valid purpose for their application to the Witnesses. There was no conduct to be regulated and no evil to be prevented, since the literature was not objectionable[30] and its distribution caused no disturbance. And no regulatory provisions were included in any of the acts. But there is no need to consider these ordinances as regulatory measures; for, as the majority opinion and both dissents agreed, the ordinances constituted, and indeed purported to be, an exercise of the power to tax. The real issue raised by them is the extent of a state's power to tax the enjoyment of freedom of religion and the press.

The publication or circulation, for religious purposes or otherwise, of newspapers, pamphlets, periodicals, and other vehicles of information and opinion, is plainly not immune from ordinary taxes for the support of the government.[31] Yet, of course, the power of a state to tax is limited by the Fourteenth Amendment.[32] The line between valid and invalid taxes on the press must be drawn somewhere between these two concepts. In general, governmental limitations on civil liberties are permitted only when necessary for the maintenance of civilized society. Mere inconvenience in securing the desired result through other means is not enough; no other means must be available.[33] Since there are numerous other ways of raising revenue, it would seem that all taxes which seriously hamper the activities of the press are unconstitutional. And so the line is actually to be drawn between taxes which do and those which do not restrict these activities.[34] It must be conceded at once that taxes are invalid if deliberately designed to curtail the circulation of information which the public is entitled to receive.[35] But what of genuine taxes? Here the line might be drawn between taxes on the sale of literature and those on its free distribution. Taxes on free distribution are improper because they impose a burden on the exercise of a

29. Unlike the Opelika ordinance, those of Fort Smith and Casa Grande granted no discretionary power to revoke a license.

30. See Donley v. Colorado Springs, 40 F. Supp. 15, 16 (D. Colo. 1941); Zimmerman v. London, 38 F. Supp. 582, 584 (S. D. Ohio, 1941); State *ex rel.* Hough v. Woodruff, 147 Fla. 299, 2 So. (2d) 577 (1941); Cincinnati v. Mosier, 61 Ohio App. 81, 82, 22 N. E. (2d) 418 (1939); State v. Meredith, 197 S. C. 351, 354, 15 S. E. (2d) 678, 679 (1941); McConkey v. Fredericksburg, 179 Va. 556, 558, 19 S. E. (2d) 682, 683 (1942).

31. Notes (1925) 35 A. L. R. 7, (1937) 110 A. L. R. 327.

32. *Ibid.* On protection of religious freedom against state action, see Cantwell v. Connecticut, 310 U. S. 296 (1940); and on similar protection for freedom of the press, see Near v. Minnesota, 283 U. S. 697 (1931).

33. See Schneider v. State, 308 U. S. 147, 162 (1939); CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) 31 *et seq.*, 402, 424 *et seq.*

34. The immunity enjoyed by religion and press may be lost when they are united with other activities not immune. Valentine v. Chrestensen, 316 U. S. 52 (1942).

35. Grosjean v. American Press Co., 297 U. S. 233 (1936).

freedom secured by the Constitution and confine the enjoyment of that freedom to those financially able to bear the expense.[36] But taxes on the sale of literature at cost and for the sole purpose of disseminating ideas do precisely the same thing. They discriminate against those least able to make themselves heard, since freedom of the press is then limited to those who can afford either to pay them or to meet the expense of distributing their work free of charge.

In the instant case the Court would appear to distinguish between taxes on the free distribution or the sale of literature at cost and those on its sale at a profit. "It is enough," said Mr. Justice Reed, "that money is earned from the sale of articles."[37] This distinction would seem at first sight to be a proper one, for if money is earned, taxes can be paid with the earnings. Freedom of the press will not be jeopardized, nor will anyone be deprived of its enjoyment because of his economic position. But the difficulty is that all taxes are not alike. The argument applies only to taxes measured by net income. Flat taxes, such as those in the present case, and taxes measured by gross income[38] may obstruct the activities of the press and so restrict its freedom. A tax measured by gross income may suppress the freedom entirely or limit its exercise to those who can afford to publish at a loss. A flat tax may do either of these things or simply permit enjoyment of the freedom only by those who earn enough to pay it. That the tax in a particular case may be met by earnings is of no significance, for if the power to tax exists, the rate can be fixed or the tax imposed by enough states to destroy the freedom.[39] If this reasoning is to be applied to taxes on interstate commerce,[40] freedom of the press should certainly be entitled to as much protection against burdensome taxation. Moreover, these were the considerations which led to the long struggle against the taxes on knowledge in England and the Stamp Acts in America. As has been seen, those taxes were, like the ones in the present case, imposed for revenue purposes.[41] Thus, it would seem that the validity of taxes on the dissemination of ideas should be determined by whether the taxes are measured by net income, or are flat taxes or measured by gross receipts.[42]

36. See Colgate v. Harvey, 296 U. S. 404 (1935) [overruled on a different point by Madden v. Kentucky, 309 U. S. 83 (1940)]; Crandall v. Nevada, 6 Wall. 35 (U. S. 1867).

37. 316 U. S. at 596.

38. But see Giragi v. Moore, 48 Ariz. 33, 58 P. (2d) 1249 (1936), *appeal dismissed*, 301 U. S. 670 (1937), and Arizona Publishing Co. v. O'Neil, 22 F. Supp. 117 (N. D. Ariz. 1938), where taxes measured by gross income were upheld.

39. See Grosjean v. American Press Co., 297 U. S. 233, 244, 245 (1936); Magnano Co. v. Hamilton, 292 U. S. 40 (1934). It should be noted that the taxes in the instant cases were substantial enough to be prohibitive in effect. See dissents of Chief Justice Stone, 316 U. S. at 604, and Mr. Justice Murphy, *id.* at 615.

40. Best v. Maxwell, 311 U. S. 454 (1940); McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940); J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938).

41. See note 5 *supra* and accompanying text.

42. The same analysis may be applied with equal force to taxes on religious organizations. Although such organizations are now generally exempted, a tax measured by

A serious threat to civil liberties is latent in the decision in the *Opelika* cases. Freedom of the press is challenged by the approval of flat taxes on sales of literature from which money is earned. This is tantamount to a declaration that the Stamp Acts would have been a valid exercise of governmental power under the Constitution. More important, freedom of religion is challenged by the imposition of a burden on the right of the Witnesses to worship the Deity in their own manner and to spread the gospel as they understand it. With the exception of the West Coast Japanese-Americans, the Witnesses are already the most persecuted minority in America.[43] Widespread opposition to them has been aroused by their criticism of organized religion, by their refusal on conscientious grounds to salute the flag, and by the activities of professional patriots who have capitalized on these things.[44] Every conceivable means from mob violence[45] to arrest on charges of vagrancy[46] has been used to silence them or regulate their conduct. In this situation, the decision in the present case will probably lead to the enactment of similar ordinances throughout the country. If so, the practice of their religion by the Witnesses through the distribution of their literature may ultimately be entirely curtailed. Sales of the literature may be made impossible because of the expense involved in paying all the taxes levied upon them. Free distribution may be made impracticable because publishing costs cannot be met. And even if these costs can be paid with funds from solicited gifts, such distribution may still be seriously hindered; for prosecutions for violations of the ordinances may be frequent and popular prejudice may result in testimony that contributions were asked or sales made.

The importance of the decision as a threat to civil liberties must, however, be viewed in the light of an express statement, by three of the dissenting Justices,[47] of a changed view on the question presented in *Minersville School District v. Gobitis*.[48] That case upheld suspensions of Witness children from

net income could be imposed upon them. On the other hand, a flat tax or one measured by gross receipts would be an unconstitutional burden on a protected liberty.

43. For a description of the persecution, see AMERICAN CIVIL LIBERTIES UNION, THE PERSECUTION OF JEHOVAH'S WITNESSES (1941). See also N. Y. Times, May 23, 1940, p. 15, col. 3; May 24, 1940, p. 13, col. 2; June 2, 1940, p. 14, col. 1; June 3, 1940, p. 9, col. 6; June 10, 1940, p. 19, col. 4; June 17, 1940, p. 17, col. 5.

44. Mob violence has frequently been led by public officials and members of the American Legion. See AMERICAN CIVIL LIBERTIES UNION, LIBERTY'S NATIONAL EMERGENCY (1941) 27.

45. Extra-legal methods which have been used include murder, kidnapping, beating and torture of men and women, and the destruction of property. See note 43 *supra*.

46. Witnesses have been charged with sedition, disrespect for the flag, riotous conspiracy (two women, one aged seventy and the other in her fifties), breach of the peace, disorderly conduct, conspiracy against the government, trespassing, offending and annoying people, soliciting and canvassing without a license, assault and battery, inciting to riot, distributing obscene literature, vagrancy, blasphemy, violating the Sabbath laws, and distributing circulars without a permit. See Kingdom News, August, 1941, p. 1, col. 1.

47. 316 U. S. at 623 (1942).

48. 310 U. S. 586 (1940). In this case Mr. Justice Stone was the only dissenting Justice.

public school for their refusal on religious grounds to salute the flag. Although the issues there differed from the ones in the principal case, Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Murphy felt that both opinions approved suppression of the free exercise of a religion practiced by a minority group. They, therefore, thought themselves justified in using this opportunity to denounce the decision in the *Gobitis* case.[49] In spite of the conclusions reached by the majority, the altered position of these three Justices suggests that the trend in the Court is fortunately in the direction of a more liberal attitude toward civil liberties.

JUDICIAL REVIEW OF THE ADMINISTRATIVE EXERCISE OF THE SUBPOENA POWER*

THE once extensive judicial supervision over administrative activities has been drastically limited by recent statutes and court decisions. In particular, judicial interference with the administrative process by interlocutory appeals has been widely restricted. All administrative remedies must be exhausted before there can be resort to the courts for relief;[1] and the "final order"

49. Other recent developments have further weakened the force of the *Gobitis* decision. In a recent decision a three-judge federal district court expressly refused to follow it. Barnette v. West Virginia State Board of Education, S. D. W. Va., Oct. 6, 1942; see Lusky, *Minority Rights and the Public Interest* (1942) 52 YALE L. J. 1, 36, n. 104; (1942) 11 INT. JURID. ASS'N BULL. 49.

Moreover, the commentators have been waging vigorous and continuous war on the *Gobitis* decision. See the criticism in Balter, *Freedom of Religion Interpreted in Two Supreme Court Decisions* (1940) 15 CALIF. S. B. J. 161; (1940) 26 CORN. L. Q. 127; (1940) 29 GEO. L. J. 112; (1940) 9 INT. JURID. ASS'N BULL. 1; (1940) 39 MICH. L. REV. 149; (1940) 18 N. Y. U. L. Q. REV. 124; (1940) 15 ST. JOHN'S L. REV. 95; (1940) 14 So. CALIF. L. REV. 56, 57; (1940) 14 So. CALIF. L. REV. 73; (1940) 14 U. OF CIN. L. REV. 570; (1940) 4 U. OF DETROIT L. J. 38; (1940) 15 WASH. L. REV. 265; Cushman, *Constitutional Law in 1939-1940* (1941) 35 AMER. POL. SCI. REV. 250, 269-271; Konovitz, *The Case of the Eight Divinity Students* (1941) 1 BILL OF RIGHTS REV. 196, 204-205; (1941) 1 BILL OF RIGHTS REV. 267; (1941) 1 BILL OF RIGHTS REV. No. 1 (Supp.); (1941) 6 Mo. L. REV. 106; Fennell, *The "Reconstructed Court" and Religious Freedom; The Gobitis Case in Retrospect* (1941) 19 N. Y. U. L. Q. REV. 31; (1942) 17 IND. L. J. 555.

But compare the approval of the Supreme Court majority's *Gobitis* opinion in (1940) 14 TEMPLE L. Q. 545; (1941) 9 J. B. A. KAN. 276.

* Perkins v. Endicott Johnson Corp., 128 F. (2d) 208 (C. C. A. 2d, 1942), *cert. granted*, 63 Sup. Ct. 35 (U. S. 1942).

1. See Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 (1938); Hegeman Farms v. Baldwin, 293 U. S. 163 (1934); Prentis v. Atlantic Coast Line Ry., 211 U. S. 210 (1908); Abelleria v. District Court of Appeals, 17 Cal. (2d) 280, 109 P. (2d) 942 (1941); Berger, *Exhaustion of Administrative Remedies* (1939) 48 YALE L. J. 981; Comments (1938) 51 HARV. L. REV. 1251, (1935) 35 COL. L. REV. 230.

doctrine prevents appeals from orders supplementary to an administrative proceeding,[2] such as those merely initiating an investigation[3] or setting a time for hearing.[4] Under many statutes the exclusive jurisdiction rule allows appeals only to designated courts.[5] Such prohibitions against interruption of the administrative process are analogous to the final judgment rule in regular judicial proceedings,[6] and are designed to promote speedy and efficient discharge of an administrator's duties.

In some situations, however, immediate judicial review of administrative determinations may still be secured. When an administrative subpoena is disregarded, statutory provisions usually compel application to the courts to secure compliance.[7] In passing on these applications, the courts are likely to think in terms of the traditional regard for the right of privacy under the Fourth Amendment, often without considering the new problems encountered by modern administrative agencies. If in the enforcement suit the court makes an extensive inquiry, it defeats the restraints otherwise imposed upon interlocutory appeals from an agency's orders.

Because of this danger in actions instituted to enforce subpoenas, some federal courts have limited the issues subject to examination, particularly with respect to an agency's jurisdiction over the subject-matter. For example, claims for exemption from the Fair Labor Standards Act, on the ground that the contestant was not engaged in interstate commerce, have not been considered in subpoena enforcement suits.[8] Nor has a judicial determination that oil producers were engaged in interstate commerce been deemed prerequisite to an administrative investigation under the Connally "Hot Oil" Act.[9] A similar rule has often been applied to orders of other administrative bodies.[10]

2. See Federal Power Comm. v. Metropolitan Edison Co., 304 U. S. 375, 383-384 (1938); Shannahan v. United States, 303 U. S. 596, 599 (1938); *In re* Deseret Mortuary Co., 78 Utah 393, 395, 3 P. (2d) 267, 268 (1931); Comment (1938) 47 YALE L. J. 766.

3. SEC v. Andrews, 88 F. (2d) 441 (C. C. A. 2d, 1937).

4. United States v. Illinois Cent. R. R., 244 U. S. 82 (1917).

5. See Newport News Shipbuilding Co. v. Schauffler, 303 U. S. 54 (1938); Anniston Mfg. Co. v. Davis, 301 U. S. 337 (1937); White v. Johnson, 282 U. S. 367 (1931); McAllister, *Statutory Roads to Review of Federal Administrative Orders* (1940) 28 CALIF. L. REV. 129.

6. See Cogen v. United States, 278 U. S. 221 (1929); Alexander v. United States, 201 U. S. 117 (1906); Crick, *The Final Judgment As a Basis for Appeal* (1932) 41 YALE L. J. 539.

7. See, for example, Public Contracts Act, 49 STAT. 2038 (1936), 41 U. S. C. § 39 (1940); Federal Trade Commission Act, 38 STAT. 722 (1914), 15 U. S. C. § 49 (1940).

8. See Cudahy Packing Co. v. Fleming, 122 F. (2d) 1005 (C. C. A. 8th, 1941), *rev'd on other grounds sub nom.* Cudahy Packing Co. v. Holland, 315 U. S. 357 (1942); Cudahy Packing Co. v. Fleming, 119 F. (2d) 209 (C. C. A. 5th, 1941); Fleming v. Montgomery Ward & Co., 114 F. (2d) 384 (C. C. A. 7th, 1940), *cert. denied,* 311 U. S. 690 (1940); *In re* Standard Dredging Corp., 44 F. Supp. 601 (S. D. N. Y. 1942); Fleming v. G & C Novelty Shoppe, 35 F. Supp. 829 (N. D. Ill. 1940).

9. President of the United States v. Skeen, 118 F. (2d) 58 (C. C. A. 5th, 1941).

10. See NLRB v. Barrett Co., 120 F. (2d) 583 (C. C. A. 7th, 1941); Graham v. Federal Tender Board, 118 F. (2d) 8 (C. C. A. 5th, 1941); The Peoples Natural Gas Co. v. Federal Power Comm., 3 Pike & Fischer, Admin. Law Serv. § 44g. 31-35 (App.

In refusing to consider the jurisdictional question at the outset of an investigation, the courts have recognized that information pertaining to the very issue contested is often unavailable to an administrator before a subpoena is granted.[11] The difficulty of discovering statutory violations without ready access to necessary records has also been emphasized.[12] And since the jurisdictional question can be fully considered in subsequent judicial review, an earlier presentation would needlessly hamper the orderly progress of administrative action.

Yet unrestricted judicial inquiry into the jurisdictional issue of interstate commerce has been supported by some courts in subpoena enforcement actions. In 1927 a Supreme Court dictum by Mr. Chief Justice Taft in *FTC v. Claire Furnace Company*[13] said that every ground of objection to an administrative investigation could be urged in a court proceeding instituted to secure compliance with a subpoena.[14] In a recent district court case, when a corporation denied that it was engaged in an activity which the Securities and Exchange Commission was qualified to supervise, even this claim was held to entitle the company to a hearing on the question prior to issuance of a subpoena.[15] This doctrine has been most explicitly developed in two recent decisions in the Sixth Circuit Court of Appeals. In *Goodyear Tire & Rubber Company v. NLRB*,[16] the court described a subpoena enforcement suit as a summary proceeding, but nevertheless declared that it possessed the power to examine the validity of an administrator's claims, instead of being restricted to the mere determination that the subpoena was regularly issued. And in *General Tobacco & Grocery Company v. Fleming*,[17] the Sixth Circuit ruled that a judicial determination as to whether the company was within the jurisdiction of the Fair Labor Standards Act was a condition precedent to enforcement of a subpoena.

In the light of this contradictory authority, *Perkins v. Endicott Johnson Corporation*,[18] a case recently decided by the Second Circuit Court of Appeals, represents a significant effort to immunize the administrative subpoena power from premature judicial inquiry. Under the Walsh-Healey Act,[19] federal jurisdiction to supervise wages and hours covers only those employees

D. C. 1942); National Mediation Board v. Virginian Ry., 2 Pike & Fischer, Admin. Law Serv. § 44g. 31-34 (E. D. Va. 1941).

11. See Cudahy Packing Co. v. Fleming, 122 F. (2d) 1005, 1009 (C. C. A. 8th, 1941), *rev'd on other grounds sub nom.* Cudahy Packing Co. v. Holland, 315 U. S. 357 (1942); *In re* SEC, 84 F. (2d) 316, 318 (C. C. A. 2d, 1936).

12. See President of the United States v. Skeen, 118 F. (2d) 58, 59 (C. C. A. 5th, 1941); Fleming v. G & C Novelty Shoppe, 35 F. Supp. 829, 830 (N. D. Ill. 1940).

13. 274 U. S. 160, 174 (1927).

14. See also Dupont De Nemours & Co. v. Boland, 85 F. (2d) 12, 15 (C. C. A. 2d, 1936); Bradley Lumber Co. v. NLRB, 84 F. (2d) 97, 100 (C. C. A. 5th, 1936).

15. SEC v. Tung Corp., 32 F. Supp. 371 (N. D. Ill. 1940). See further FTC v. Smith, 34 F. (2d) 323 (S. D. N. Y. 1929).

16. 122 F. (2d) 450 (C. C. A. 6th, 1941).

17. 125 F. (2d) 596 (C. C. A. 6th, 1942).

18. 128 F. (2d) 208 (C. C. A. 2d, 1942), *cert. granted*, 63 Sup. Ct. 35 (1942).

19. 49 STAT. 2036 (1936), 41 U. S. C. §§ 35-45 (1940).

engaged in manufacturing for government contracts. The Secretary of Labor, suspecting possible violations of wage requirements prescribed by the Act, had issued two subpoenas ordering Endicott Johnson to subject certain employment records to an administrative investigation. Endicott Johnson refused to produce the records of several factories on the ground that the persons employed there were only indirectly engaged in manufacturing products furnished the government. Pursuant to provisions of the statute, the Secretary then applied to a United States District Court for enforcement of the order.[20] After conducting an extended hearing, the court found that the operations of the plant in question were not covered by the Walsh-Healey Act and declined to permit inspection of the records.[21] In reversing this decision, the Circuit Court held that the subpoenas should have been enforced without taking any testimony whatever on the issue of the Act's jurisdiction. An exhausting opinion by Judge Frank reviews and attempts to evaluate the various conflicting principles presented in previous considerations of this issue.

Although an administrative body was formerly denied exclusive initial power to decide the issues of fact and law upon which jurisdictional questions depend,[22] these precedents have been discarded by a line of decisions beginning with *Myers v. Bethlehem Shipbuilding Corporation*.[23] While the complainant there alleged uncontested facts which placed it beyond the jurisdiction of the National Labor Relations Act, the Supreme Court held that such an objection did not warrant an injunction against a hearing instituted by the Board. As recognized in the unanimous opinion of Mr. Justice Brandeis, piecemeal disposition of administrative determinations on appeal must be prohibited, regardless of allegations that the hearing might prove futile or result in irreparable damage to the complainant. Moreover, if an administrator decides a jurisdictional matter in the first instance, the availability of judicial review upon completion of the agency's action was held to provide sufficient protection against possible abridgement of constitutional privileges.[24] An initial administrative determination of jurisdiction thus may not be enjoined, and in the instant case Judge Frank argued that this prohibition would become meaningless if judicial examination of the same question were permitted in a subpoena enforcement action.

20. Perkins v. Endicott Johnson Corp., 37 F. Supp. 604 (N. D. N. Y. 1941).

21. Perkins v. Endicott Johnson Corp., 40 F. Supp. 254 (N. D. N. Y. 1941).

22. See Gonzales v. Williams, 192 U. S. 1, 15 (1904); Darger v. Hill, 76 F. (2d) 198, 200 (C. C. A. 9th, 1935).

23. 303 U. S. 41 (1938). See also Newport News Shipbuilding Co. v. Schauffler, 303 U. S. 54 (1938). This doctrine was reaffirmed in Gray v. Powell, 314 U. S. 402 (1941).

24. A consistent application of the doctrine enunciated in the *Myers* case would make it even unnecessary for an administrator to allege a "reason to believe" that an investigation is justified to secure enforcement of a subpoena. This doctrine was followed in Fleming v. Montgomery Ward & Co., 114 F. (2d) 384, 390 (C. C. A. 7th, 1940); and see Bank of America Nat. Trust & Savings Ass'n v. Douglas, 105 F. (2d) 100, 105 (App. D. C. 1939). *Contra:* SEC v. Tung Corp., 32 F. Supp. 371, 373 (N. D. Ill. 1940).

The court also relied upon the rule applied when a court's aid is invoked to compel testimony in connection with a grand jury investigation or a hearing in another tribunal.[25] In such situations, an enforcing court's inquiry is limited to such questions as the legal authority of the primary tribunal and the materiality of the evidence desired.[26] A witness's objections to the grand jury's jurisdiction, its application of substantive law, or the competency of the testimony adduced can only be tested by demurrer to the grand jury's indictment or by appropriate proceedings in the primary action.[27] While the witness's constitutional privileges against self-incrimination and unreasonable search and seizure must be given careful consideration,[28] it is the duty of the auxiliary judge to accord the primary court the widest possible latitude in the conduct of such examinations.[29]

Under the old narrow conception of the powers of administrative bodies, the use of administrative subpoenas was restricted in three decisions not involving the issue of an agency's jurisdiction over the contestants; and the philosophy of these cases was the primary obstacle which Judge Frank had to overcome in his opinion. In *Interstate Commerce Commission v. Brimson*,[30] the Supreme Court's actual holding was that an administrator could constitutionally issue a subpoena and apply to a court for its enforcement. But in dictum Mr. Justice Harlan declared that the defendant could fully contest before the court any orders which threatened to impair the constitutional guarantees against unreasonable searches and seizures. In two other cases, subpoenas were denied enforcement because the proposed investigations were too broad in scope. In *Harriman v. Interstate Commerce Commission*,[31] Mr. Justice Holmes, primarily concerned with preventing any encroachments upon the right of privacy, construed Section 12 of the Interstate Commerce Act as giving the Commission power to exact evidence only as to complaints for violations of the Act. Thus a general investigation conducted by the Commission was declared void for lack of statutory authority.[32] A similar inquiry was denied judicial support in *Ellis v. Interstate Commerce Commission*,[33] when the court again objected to the sweeping latitude of the information sought.[34]

25. This analogy has been recognized in previous judicial decisions. See Consolidated Mines v. SEC, 97 F. (2d) 704, 708 (C. C. A. 9th, 1938); Woolley v. United States, 97 F. (2d) 258, 262 (C. C. A. 9th, 1938); *In re* SEC, 84 F. (2d) 316, 318 (C. C. A. 2d, 1936).

26. Dowagiac Mfg. Co. v. Lochren, 143 Fed. 211, 215 (C. C. A. 8th, 1906).

27. Blair v. United States, 250 U. S. 273, 282 (1919).

28. Perry v. Rubber Tire Wheel Co., 138 Fed. 836, 837 (C. C. S. D. N. Y. 1905).

29. Matter of Roberts, 214 App. Div. 271, 275, 212 N. Y. Supp. 183, 187 (1st Dep't 1925).

30. 154 U. S. 447 (1894).

31. 211 U. S. 407 (1908).

32. Doubts as to the constitutionality of wider investigatory powers have now been dispelled. See Electric Bond & Share Co. v. SEC, 303 U. S. 419 (1938); Smith v. ICC, 245 U. S. 33 (1917).

33. 237 U. S. 434 (1915).

34. It will be noted that infringement upon privacy is the chief objection urged against administrative subpoenas in these cases; while jurisdiction has been the issue

Since, however, there was no claim in the *Endicott Johnson* case that the administrator lacked statutory authority or that the evidence demanded was too broad, the holdings of the earlier decisions are completely irrelevant. Moreover, as Judge Frank points out, the change in the past three decades in the judicial attitude toward the relationship between agencies and courts has nullified the latent major premises of these early cases. Despite this alteration in the judicial approach to administrative law, the *Harriman* and *Ellis* cases have recently been cited with apparent approval by Mr. Justice Frankfurter in *Cobbledick v. United States.*[35] Yet this reference in the *Cobbledick* case was solely to distinguish the actual holdings of the earlier opinions from the issue in that decision; and, as Judge Frank recognizes, it probably was not intended to approve their theory of the breadth of judicial inquiry.

If judicial review over subpoena enforcement is curtailed in the manner advocated by the Second Circuit, the courts will still continue to exercise their traditional functions of preventing manifestly unreasonable or unauthorized administrative investigations. In addition to the judicial review accorded to all final administrative determinations, some interlocutory appeals are permitted. If the constitutionality of a statute creating an agency were challenged, the issue would receive immediate judicial attention.[36] Similarly, a jurisdictional defect may affirmatively appear on the face of the record, as where a subpoena is issued by a subordinate officer lacking requisite authority,[37] or a person has intentionally ceased an activity which would subject him to the jurisdiction of an agency.[38] Finally, if the information sought is clearly immaterial or unduly indefinite, courts will declare a subpoena to be an oppressive search and seizure.[39] Yet while the limitations of specificity and relevancy remain to bulwark the Fourth Amendment, courts must also recognize the need of according agencies freedom in the exercise of investigatorial powers. Thus the reasonableness of subpoenas has been judged in a few recent cases not alone by traditional standards developed by the courts, but also by balancing the public necessity for an investigation against the hardship caused those who are investigated.[40]

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generally raised in recent subpoena enforcement actions. This represents, however, merely a shift in the point of attack rather than a fundamental alteration of the objection against administrative subpoenas.

35. 309 U. S. 323 (1940). (An order denying a motion to quash a subpoena was here held to be not a "final" order entitled to immediate judicial review).

36. See NLRB v. New England Transportation Co., 14 F. Supp. 497 (D. Conn. 1936).

37. Cudahy Packing Co. v. Holland, 315 U. S. 357 (1942) (but see the vigorous dissent by Mr. Justice Douglas, 315 U. S. at 367); Harriman v. ICC, 211 U. S. 407 (1908).

38. Jones v. SEC, 298 U. S. 1 (1936) (Justices Cardozo, Brandeis, and Stone dissented).

39. See FTC v. American Tobacco Co., 264 U. S. 298 (1924); Goodyear Tire & Rubber Co. v. NLRB, 122 F. (2d) 450 (C. C. A. 6th, 1941); Handler, *Constitutionality of Investigations* (1928) 28 COL. L. REV. 708, 905.

40. See Newfield v. Ryan, 91 F. (2d) 700, 702 (C. C. A. 5th, 1937), *cert. denied,* 302 U. S. 729 (1937); McMann v. SEC, 87 F. (2d) 377, 379 (C. C. A. 2d, 1937), *cert. denied,* 301 U. S. 684 (1937).

The need for expeditious use of the subpoena power in effective enforcement of remedial social legislation[41] is fully recognized in Judge Frank's position. But if undue judicial control over the exercise of this subpoena power is to be curbed, an express repudiation of the attitudes reflected in the *Brimson, Harriman* and *Ellis* cases seems essential. In the absence of such judicial action, statutes may be drafted to limit the scope of a court's supervision,[42] or agencies may be vested with contempt powers.[43] However, a Supreme Court decision defining the sphere of judicial inquiry in a subpoena enforcement proceeding would both safeguard constitutional rights and insure speedy and efficient administrative action.

41. Perkins v. Endicott Johnson Corp., 128 F. (2d) 208, 216 (C. C. A. 2d, 1942).

42. See Comment (1938) 47 YALE L. J. 766.

43. See Albertsworth, *Administrative Contempt Powers: A Problem in Technique* (1939) 25 A. B. A. J. 954.